FOR ARGUMENT

Nos. 78-349 and 78-546

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY HELSTOSKI

HENRY HELSTOSKI, PETITIONER

v.

HON. H. CURTIS MEANOR,
UNITED STATES DISTRICT JUDGE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement	4
A. The pre-indictment proceedings	5
B. Proceedings in the district court	8
C. The decision of the court of appeals	10
D. Further proceedings	13
Introduction and summary of argument	14
Argument	27
I. The Speech or Debate Clause does not bar the admission of all evidence that may tend to show the past performance of a legislative act	27
A. When a Member of Congress is charged with a criminal offense, proof of which does not require a showing of any legislative act, probative evidence should not be excluded solely because it may refer to the past performance of a legislative act	29

Argument—Continued Page

1. The history of the Speech or Debate Clause indicates that the Clause is not concerned with evidentiary references to past legislative acts, but rather is designed to preclude inquiry by the Executive and Judicial Branches into the substance of legislative activity 29

2. Prior decisions of this Court indicate that the Speech or Debate Clause privilege does not extend to statements made and acts occurring outside the legislative process, even where such acts or statements refer to past legislative acts or give rise to an inference that a particular legislative act has been performed 42

3. Strong policy considerations support the admission of the testimonial evidence proffered by the government 67

B. When a Member of Congress is prosecuted for receiving a bribe, in violation of 18 U.S.C. 201, evidence referring to legislative acts is admissible, because Section 201 is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" 76

Argument—Continued Page

II. *Brewster* establishes the constitutionality of the first four counts in respondent's indictment, and the court of appeals properly refused to issue a writ of mandamus barring respondent's trial on those counts 88

A. Apart from the merits of respondent's arguments, this is not an appropriate case for mandamus 89

B. References in the indictment to specific legislative acts do not render the charges against respondent invalid 93

C. The grand jury's consideration of respondent's legislative acts does not render the indictment invalid.. 97

D. The evidentiary ruling of the courts below does not constructively amend the indictment 103

III. Respondent waived his Speech or Debate privilege with respect to the use of his testimony and documents by the grand juries investigating private immigration legislation and at trial on indictments arising out of that investigation 106

A. Background of the waiver issue in this litigation 106

Argument—Continued Page

B. Under previous decisions of this Court involving waivers of constitutional rights, respondent's voluntary testimony and production of documents, together with his express disclaimer of immunity, were sufficient to waive the Speech or Debate privilege 110

C. An individual Senator or Representative can waive the Speech or Debate privilege 112

D. In view of respondent's undisputed awareness of the Speech or Debate Clause and his explicit eschewal of any request for immunity, his voluntary testimony and production of documents were sufficient to waive his evidentiary privilege..... 116

E. Even if respondent's testimony and production of documents do not constitute a waiver with respect to the use at trial of the evidence thus obtained, they do foreclose any objection to the grand jury's consideration of that evidence 122

Conclusion 124

CITATIONS

Cases: Page

Abney v. *United States*, 431 U.S. 651 aff'd, 530 F.2d 963 .....24, 91, 92
Anderson v. *Dunn*, 19 U.S. (6 Wheat.) 204 41
Ashton v. *Kentucky*, 384 U.S. 195 86
Bain, Ex parte, 121 U.S. 1 .....104, 105
Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 89
Burton v. *United States*, 202 U.S. 344..... 19, 78
Cantwell v. *Connecticut*, 310 U.S. 296..... 86
Chapman, In re, 166 U.S. 661 79
Cobbledick v. *United States*, 309 U.S. 323 90
Coffin v. *Coffin*, 4 Mass. 1 .....58, 84, 115
Costello v. *United States*, 350 U.S. 359....99, 100
DiBella v. *United States*, 369 U.S. 121.... 90
Doe v. *McMillan*, 412 U.S. 306 .....59, 75, 76
Dombrowski v. *Eastland*, 387 U.S. 82 91
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 91
Elfbrandt v. *Russell*, 384 U.S. 11 86
Ford v. *United States*, 273 U.S. 593 97
Garner v. *United States*, 424 U.S. 648..... 110
Grand Jury Proceedings (Cianfrani), In re, 563 F.2d 577 115
Gravel v. *United States*, 408 U.S. 606..... 26, 59, 66, 75, 100, 115, 119
Holt v. *United States*, 218 U.S. 245 101
Johnson v. *Zerbst*, 304 U.S. 458 .....110, 117
Jurney v. *MacCracken*, 294 U.S. 125 ..... 41, 79
Kerr v. *United States District Court*, 426 U.S. 394 .....10, 89, 90
Kilbourn v. *Thompson*, 103 U.S. 168....39, 41, 58, 77, 79

Cases—Continued — Page

Lawn v. *United States*, 355 U.S. 339 101
May v. *United States*, 175 F.2d 994, cert. denied, 338 U.S. 830 79
Mutual Life Insurance Co. v. *Hillmon*, 145 U.S. 285 61
Parr v. *United States*, 351 U.S. 513 89
Powell v. *McCormack*, 395 U.S. 486..... 37, 77, 91, 115
Roche v. *Evaporated Milk Ass'n.*, 319 U.S. 21 89-90
Schiaffo v. *Helstoski*, 350 F. Supp. 1076 rev'd in part, aff'd in part, and remanded, 492 F.2d 413 107
Schneckloth v. *Bustamonte*, 412 U.S. 218.. 110
Stirone v. *United States*, 361 U.S. 212.... 104
Tenney v. *Brandhove*, 341 U.S. 367 ..... 38, 58
United States v. *Annunziato*, 293 F.2d 373, cert. denied, 368 U.S. 919 61
United States v. *Blue*, 384 U.S. 251....11, 101-102
United States v. *Brewster*, 506 F.2d 62.... 52, 54
United States v. *Brewster*, 408 U.S. 501..*passim*
United States v. *Brown*, 381 U.S. 437.... 41
United States v. *Bryan*, 339 U.S. 323..... 69, 73
United States v. *Calandra*, 414 U.S. 338..11, 101, 102
United States v. *Calvert*, 523 F.2d 895, cert. denied, 424 U.S. 911 61
United States v. *Cirami*, 510 F.2d 69, cert. denied, 421 U.S. 964 97
United States v. *Craig*, 528 F.2d 773 vacated and remanded on other grounds, 537 F.2d 957 115
United States v. *Dawson*, 516 F.2d 796, cert. denied, 423 U.S. 855 97

Cases—Continued — Page

United States v. *DeFalco*, Crim. No. 75-264 (D. N.J. Oct. 17, 1975), aff'd, 546 F.2d 419, cert. denied, 430 U.S. 965.... 7
United States v. *DiSilvio*, 520 F.2d 247, cert. denied, 423 U.S. 1015 92
United States v. *Dowdy*, 479 F.2d 213, cert. denied, 414 U.S. 823 96
United States v. *Hall*, 536 F.2d 313, cert. denied, 429 U.S. 919 97
United States v. *Garmatz*, 445 F. Supp. 54 64
United States v. *Johnson*, 337 F.2d 180, affirmed on remand, 419 F.2d 56, cert. denied, 397 U.S. 1010 .....47, 49, 79, 102
United States v. *Johnson*, 383 U.S. 169....*passim*
United States v. *MacDonald*, 435 U.S. 850 90
United States v. *McCrane*, 527 F.2d 906, cert. denied, 426 U.S. 906 97
United States v. *Nixon*, 418 U.S. 683..... 69, 83
Wason, Ex parte, L.R. 4 Q.B. 573 ..... 48, 49
Watkins v. *United States*, 354 U.S. 178.... 34, 41
Whitehill v. *Elkins*, 389 U.S. 54 86
Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655 89
Will v. *United States*, 389 U.S. 90 89

Constitution, statutes and rule:

United States Constitution:

Article I:

Section 1 78
Section 5, Punishment Clause.... 19, 20, 77, 84

Constitution, statutes and rule—Continued Page

Section 6, Speech or Debate Clause ..... *passim*
Section 8, Necessary and Proper Clause 78

Article III 112
First Amendment 86, 88
Fourth Amendment 101
Fifth Amendment 15, 23, 25, 97, 106, 109

Rev. Stat. 1782, 13 Stat. 123 78
Rev. Stat. 5209 105
10 Stat. 170, 171 80
2 U.S.C. 192 79
18 U.S.C. 201 ..... *passim*
18 U.S.C. 201(a) 77, 86
18 U.S.C. 201(c) ..... *passim*
18 U.S.C. 201(c)(1) 4, 54
18 U.S.C. 201(g) 4, 16, 48, 52, 54, 57, 93, 95
18 U.S.C. 203 ..... 47, 78
18 U.S.C. (1964 ed.) 281 47
18 U.S.C. 371 .....5, 7, 45, 85
18 U.S.C. 912 6
18 U.S.C. 1503 5
18 U.S.C. 1623(a) 5
18 U.S.C. 1951 105
Fed. R. App. P. 4(b) 24, 91

Miscellaneous:

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Miscellaneous—Continued Page

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Conflicts of Interest: Hearings Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1962) 81
Cong. Globe 32d Cong., 2d Sess. 291 (1853) 80
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Miscellaneous—Continued Page

Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L.J. 335 (1965) 36, 40, 41
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OPINIONS BELOW

The opinion of the court of appeals (78-349 Pet. App. 1a-33a) is reported at 576 F.2d 511. The

opinions of the district court (78-349 Pet. App. 38a-62a; 78-546 Pet. App. 9a-22a) are not reported.

JURISDICTION

The judgment of the court of appeals (78-349 Pet. App. 34a-35a) was entered on April 13, 1978. Petitions for rehearing were denied on June 30, 1978 (78-349 Pet. App. 36a; 78-546 Pet. App. 8a). On July 25, 1978, Mr. Justice Brennan extended the government's time within which to file a petition for a writ of certiorari to and including August 29, 1978. The petition in No. 78-349 was filed on that date. On September 29, 1978, Mr. Justice Brennan extended Helstoski's time within which to file a petition for a writ of certiorari to and including October 3, 1978. The petition in No. 78-546 was filed on September 29, 1978. The petitions were granted and the cases consolidated on December 11, 1978. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars the government from introducing, in the bribery trial of a former Congressman, any evidence that refers to the defendant's past performance of a legislative act (No. 78-349).

2. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201 (c), is invalid because it refers to specific legislative acts that are themselves immune from prosecution under the Speech or Debate Clause (No. 78-546).

3. Whether an indictment charging a member of Congress with bribery, in violation of 18 U.S.C. 201 (c), is invalid because the grand jury that returned the indictment considered evidence of legislative acts that may have been privileged under the Speech or Debate Clause (No. 78-546).

4. Whether the district court's restriction of the government's proof at trial to prevent references to past legislative acts is a constructive amendment of the indictment (No. 78-546).

5. Whether a Congressman's voluntary testimony and production of documents before a grand jury waives the Speech or Debate Clause privilege with respect to subsequent use of the testimony and documents by the grand jury and at trial, at least where it is clear that the Congressman knew of, but deliberately chose not to invoke, the privilege (No. 78-349).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> [F]or any Speech or Debate in either House, they [*i.e.*, Senators and Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section: "public official" means Member of Congress * * *
>
> * * * * *
>
> "official act" means any decision or action on any * * * matter * * * which may by law be

brought before any public official, in his official capacity, or in his place of trust or profit.

* * * * *

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act * * * [shall be guilty of an offense].

* * * * *

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him * * * [shall be guilty of an offense].

STATEMENT

Respondent is a former member of the House of Representatives.[1] He represented New Jersey's Ninth

[1] For convenience sake, we refer to former Rep. Helstoski as "respondent," even though he is the petitioner in No. 78-546.

By agreement between the parties, respondent filed an opening brief addressing the questions presented in both petitions. The present brief in turn states the position of the United States as petitioner in No. 78-349 and respondent in No. 78-546.

Congressional District from 1965 to 1976. In June 1976, respondent was indicted in the United States District Court for the District of New Jersey on several charges arising out of grand jury investigations into alleged corruption in connection with private immigration legislation. Respondent was charged with three counts of soliciting and receiving bribes in return for being influenced in the performance of official acts, in violation of 18 U.S.C. 201(c)(1), and one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371 (78-546 Pet. App. 1a-6a).[2] These four counts alleged that respondent took bribes in excess of $7,000 in exchange for introducing private immigration bills on behalf of some of his constituents.

A. The Pre-Indictment Proceedings.

During the grand jury investigations, respondent appeared before eight different grand juries on ten separate occasions from April 1974 until May 1976 (78-349 Pet. App. 5a). Respondent voluntarily tes-

[2] Respondent was also indicted on four counts of knowingly making false declarations to a grand jury, in violation of 18 U.S.C. 1623(a), one count of obstructing justice by attempting to influence a grand jury witness to testify falsely, in violation of 18 U.S.C. 1503, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Respondent was the only defendant named in the perjury counts; the conspiracy and obstruction of justice counts named three members of respondent's congressional staff as co-defendants. The latter counts, as well as two perjury counts against one of respondent's co-defendants, were severed by the district court for later disposition (78-349 Pet. App. 39a n.1).

tified before those grand juries about his introduction of private immigration bills. He described in detail his motives for introducing the bills, the procedures by which he presented the bills in the House of Representatives, and the procedures used by his office to deal with private bill requests. He also testified regarding his own purported investigations of charges of fraud and bribery touching the private immigration bills (*ibid.*; C.A. App. 830-863, 944-967).[3] In addition, respondent produced for the grand jury voluminous files concerning the private bills. The files contained correspondence with Albert DeFalco, respondent's former administrative aide, and with the constituents for whom respondent introduced private bills. Copies of the bills themselves were also included. Respondent also testified and produced documents referring to the private bills when he appeared as a defense witness in DeFalco's criminal trial in October 1975 (78-349 Pet. App. 5a-6a; C.A. App. 89-215).[4]

[3] "C.A. App." refers to the five-volume appendix filed by the United States in the court of appeals.

[4] DeFalco's indictment was a product of the same series of grand jury investigations that ultimately led to the filing of criminal charges against respondent. DeFalco was respondent's administrative assistant in 1967 and 1968. After that time, he posed as a member of respondent's staff, even though he had left respondent's employ. DeFalco was convicted on three counts of violating 18 U.S.C. 912 by falsely representing himself as respondent's aide and, acting as such, demanding and receiving payments from illegal aliens who wished to have private bills granting them permanent residence in the United States introduced in Congress. He was also convicted of conspiracy to commit the substantive offense, in violation of 18 U.S.C. 371. He was sentenced to six years' imprisonment. *United States* v. *DeFalco*, Crim. No. 75-264 (D. N.J. Oct. 17, 1975), aff'd, 546 F.2d 419 (3d Cir. 1976), cert. denied, 430 U.S. 965 (1977).

Before his first grand jury appearance in April 1974, and on each subsequent appearance, the government advised respondent that he could refuse to answer questions if he believed that to do so might incriminate him (*id.* at 6a). The government also warned respondent that he was not under any compulsion to produce documents:

> Of course, you understand that if you wish not to present those documents you do not have to and that anything you do present may also, as I have told you about your personal testimony, may be used against you later in a court of law?

C.A. App. 697. To this respondent replied:

> I understand that. Whatever I have will be turned over to you with full cooperation of this Grand Jury and with yourself. * * * I promise full cooperation with your office, with the FBI, [and] this Grand Jury. * * * As I indicated, I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances.

Id. at 697, 699. Respondent first asserted a Speech or Debate privilege at his next to last appearance before the grand jury (in May 1976), and then he did so only with respect to one question (*id.* at 1501-1502). He later invoked his privilege against self-

incrimination and refused to answer further questions or provide other documents (*id.* at 1473-1493, 1506-1517).

B. Proceedings in the District Court.

Respondent moved to dismiss the four counts of the indictment that charged him with agreeing to receive and receiving payments from specified illegal aliens in return for being influenced to introduce private immigration bills in their behalf. He argued that these counts violate the Speech or Debate Clause (C.A. App. 38-50). The district court denied respondent's motion to dismiss but held that the Speech or Debate Clause prohibits the government from proving "the performance of any legislative act by the Congressman in support of any of the first four counts of the indictment" (*id.* at 240-241). The court initially indicated that language in the indictment alleging the actual introduction of private immigration bills (see 78-546 Pet. App. 2a-6a) would have to be redacted before the indictment could be read or submitted to the jury at trial (C.A. App. 242-243), but in its written opinion issued two and a half weeks after its oral ruling, the court abandoned the redaction requirement and held that the first four counts of the indictment are valid, "notwithstanding their reference to legislative acts of [respondent]" (78-349 Pet. App. 47a).

The government filed a motion *in limine* seeking specific rulings on whether certain proffered evidence, including the expected oral testimony of certain witnesses and the contents of respondent's legislative files produced for the grand juries, would be admissible at

trial. The government argued that respondent waived his Speech or Debate Clause privilege by his extensive prior disclosures before the grand juries and by his express disclaimer of immunity. The government further contended that its evidence could be admitted without infringing the Speech or Debate Clause because the evidence was offered only to prove respondent's knowledge and purpose in agreeing to accept the bribes.[5]

The district court found that respondent's disclosures before the grand jury were voluntary and that he was aware of the availability of the Speech or Debate Clause privilege when he testified and produced the documents (78-349 Pet. App. 48a n.4, 49a). The court nevertheless concluded that respondent did not waive his privilege, because "[s]uch a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts" (*id.* at 58a).

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[5] The evidence proffered by the government included a narrative offer of proof setting forth the expected testimony of various witnesses in support of each allegation of bribery and conspiracy. The evidence also included more than 200 documents obtained from the files produced by respondent. The district court and the court of appeals ordered these materials placed under seal to protect respondent's right to a fair trial. The government's offer of testimonial proof and representative examples of the documentary evidence obtained from respondent's files have been reprinted in a special appendix filed under seal in this Court with the petition in No. 78-349.

The district court did not rule on each item of evidence proffered by the government. Instead the court simply repeated and elaborated on the evidentiary restriction it had previously imposed in its oral decision. The court stated that "prosecutorial use of evidence of the performance of legislative acts by a congressman as proof of his guilt of a federal crime conflicts squarely with the command of the Speech or Debate Clause" (78-349 Pet. App. 47a). Accordingly, the court concluded (*id.* at 62a), "the Government may not, during its case-in-chief, introduce evidence, derived from any source and for any purpose, of the past performance of a legislative act by [respondent]."

C. The Decision of the Court of Appeals.

The government appealed the district court's evidentiary ruling, and in June 1977, approximately three months after the government's notice of appeal was filed, respondent petitioned the court of appeals for a writ of mandamus directing the district court to dismiss the first four counts of the indictment.

The court of appeals refused to grant the extraordinary relief sought by respondent (78-349 Pet. App. 9a-21a). Citing *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976), the court indicated that mandamus is a drastic remedy to be invoked only in exceptional circumstances where the right to relief is clear and other adequate remedies are unavailable. The court held that, under *United States* v. *Brewster*, 408 U.S. 501 (1972), the indictment in this case does

not violate the Speech or Debate Clause, even though it does list certain legislative acts performed by respondent (78-349 Pet. App. 13a-15a). The court further ruled that the evidentiary restrictions imposed by the district court did not constructively amend the indictment to charge a different offense, because "[t]he proofs supporting the essential elements of the crime charged have not been modified from those considered and found sufficient to support a finding of probable cause by the grand jury" (*id.* at 17a). Finally, the court of appeals refused to issue a writ of mandamus on the basis of respondent's contention that the district court lacks jurisdiction to try the first four counts of the indictment because the grand jury that returned the indictment considered materials protected by the Speech or Debate privilege. The court stated that respondent's argument concerning the evidence reviewed by the grand jury "does not go to the jurisdiction of the district court, but to the proper means that this court should use to effectuate the [Speech or Debate] Clause" (*id.* at 20a). Because respondent did not raise a valid jurisdictional objection, the court of appeals decided that his argument did not warrant an exercise of the extraordinary mandamus power, but was "better left for decision on appeal from a final judgment" (*ibid.*). On the merits, the court cited *United States* v. *Calandra*, 414 U.S. 338 (1974), and *United States* v. *Blue*, 384 U.S. 251 (1966), and declared that "it is far from 'clear and indisputable' that * * * presentation to the grand jury of evidence in violation of the Speech or Debate

Clause requires dismissal of the indictment" (*id.* at 20a-21a).

Turning to the government's appeal, the court affirmed the district court's evidentiary ruling. In describing the scope of the Speech or Debate privilege, however, the court of appeals used language that appears to require the exclusion of much evidence that may have been admissible under the district court's opinion. The court of appeals concluded that the Speech or Debate Clause prohibits the government from introducing any evidence that even *refers* to a past legislative act. The court stated (78-349 Pet. App. 28a-29a):

> The [Supreme] Court has been clear in its prohibition of "any showing" of legislative acts * * *. Legislative acts may not be shown in evidence for any purpose in this prosecution.
>
> Nor may the Government circumvent this clear requirement by introducing correspondence and statements that, though not legislative acts themselves, contain reference to past legislative acts of the defendant. To allow a showing by such secondary evidence could render *Brewster's* absolute prohibition meaningless. The Government would be able to prove any legislative act simply by producing non-privileged evidence containing some reference to that act. To allow proof of legislative acts in such a manner would reduce drastically the effectiveness of the Speech or Debate provision, and would discourage the dissemination to the public of information about legislative activities.

The court of appeals also refused to find a valid waiver of the Speech or Debate privilege in this case. The court acknowledged that respondent testified and produced documents before the grand jury voluntarily and with full awareness of his right to assert the privilege (78-349 Pet. App. 29a). Nonetheless, the court found no waiver. Without deciding whether the privilege can ever be waived, the court held that "the Speech or Debate Clause's function as a protection for the legislative branch against encroachment by the executive and judicial branches precludes a finding of waiver in the context of a criminal prosecution except where the member expressly forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts" (*id.* at 30a-31a).

D. Further Proceedings.

Following the decision of the court of appeals, a pretrial conference was held in the district court on August 3, 1978. At this conference the district court declined the government's request to rule in advance of trial on the admissibility, under the court of appeals' decision, of specific items of proffered evidence. The court stated that it would exclude any item of evidence that contained any reference to or would afford any basis for inferring the performance of a past legislative act; the court also indicated that it would exclude evidence of payments of money to respondent subsequent to any legislative act, on the theory that the jury might infer from proof of such

payments that respondent had fulfilled his part of the illegal bargain by performing legislative acts.[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

The Speech or Debate Clause was intended to protect the integrity and independence of Congress and to ensure that the work of legislating can proceed without interference from the Executive or the Judicial Branch. The Clause provides that, "for any Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place."

To effectuate the purpose of the Clause, the phrase "Speech or Debate" has been construed broadly to include not only actual speeches or debates, but also any "act generally done in Congress in relation to the business before it." *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). At the same time, however, the Court has stressed that the Clause does not cover "all conduct *relating* to the legislative process"; protection is provided only for those acts that are "clearly a part of the legislative process—the *due* functioning of the process." *Id.* at 515-516.

By its terms the Speech or Debate Clause forbids certain "questioning" of Senators and Representatives; for their "Speech or Debate" in Congress, they

[6] In the special appendix filed with the petition in No. 78-349, italics have been used to designate those portions of the government's offer of proof that we believe would definitely or probably be excluded at trial on the basis of the court of appeals' decision as construed by the district court.

may not be questioned outside Congress. The language of the Clause thus clearly provides a witness's privilege, analogous in some ways to the Fifth Amendment privilege against self-incrimination. Senators and Representatives may not be called upon outside Congress, and in particular may not be called upon in court, to answer questions about their "Speech or Debate" in Congress.

History shows that the Framers also intended the Clause to confer an immunity from the imposition of criminal or civil liability on account of a Member's "Speech or Debate." The English antecedents of the Clause were the product of a lengthy struggle between Parliament and the Crown during which many members of the House of Commons were imprisoned for their legislative acts. Adoption of the Speech or Debate Clause by the Constitutional Convention reflected a judgment that Members of Congress should be free to perform their legislative duties without fear of criminal punishment or civil liability based on their congressional conduct.

As a corollary to the immunity provided by the Clause, courts have recognized an evidentiary privilege of uncertain scope. Unlike most evidentiary privileges, such as those covering communications between an attorney and his client or a physician and his patient, the legislative privilege is not a privilege of confidentiality. Most legislative acts are public. The evidentiary privilege enjoyed by Members of Congress is not intended to keep such acts secret; rather, it is simply a means of implementing the

Speech or Debate Clause immunity by preventing judicial inquiry into legislative acts. The exclusion of probative evidence relating to legislative acts is justified insofar as it is demonstrated to be necessary to avoid a substantial danger that criminal or civil liability will be imposed on the basis of conduct protected by the Clause.

The principal question in this case concerns the proper application of this evidentiary privilege in the bribery prosecution of a former Congressman. The limits of the privilege should accord with its role as an aid to the immunity provided by the Speech or Debate Clause; they should not be enlarged unnecessarily, lest the sound administration of justice be subverted without meaningful service to the goal of legislative independence. As this Court stated in *United States* v. *Brewster*, *supra*, 408 U.S. 517, "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."

A. *Brewster* held that the Speech or Debate Clause does not bar prosecutions of Members of Congress for soliciting or receiving payments in return for the performance of a legislative act, in violation of 18 U.S.C. 201(g), or in return for being influenced in the performance of a legislative act, in violation of 18 U.S.C. 201(c). Exclusion of evidence such as that proffered by the government in this case would make it substantially more difficult to prove such charges against Members of Congress, but it would not further the purpose of the Speech or Debate Clause.

If permitted to testify, the government's witnesses would recount conversations occurring wholly outside Congress, conversations related to respondent's alleged efforts to obtain bribes in return for being influenced in the performance of legislative acts. Respondent does not suggest that either the conversations or his part in them can legitimately be characterized as legislative acts. The bribery scheme itself is manifestly not "part of * * * the *due* functioning of the [legislative] process." Under these circumstances, suppression of the government's evidence that respondent demanded and received illegal payments for introducing private immigration bills could not possibly contribute to the legislative independence that the Framers sought to protect.

The district court and the court of appeals nonetheless refused to admit the proffered testimony, on the ground that it would recount conversations referring to past legislative acts. This decision, predicated upon a misreading of an isolated passage in the *Brewster* opinion, represents a mechanical application of the evidentiary privilege that goes far beyond "what is necessary to preserve the integrity of the legislative process." Nothing in the history of the Speech or Debate Clause or in this Court's prior decisions requires that the Clause's ancillary evidentiary privilege be given such a wide compass.

Moreover, the evidentiary restriction imposed by the courts below is logically flawed. If the vice to be avoided is the introduction of evidence that may tend to show the performance of a legislative act, then it makes little sense to exclude evidence referring to past

legislative acts but at the same time to admit evidence of a legislator's agreement to perform such acts in the future. While the first kind of evidence may be slightly more probative of the actual performance of a legislative act than the second, both circumstantially indicate to the jury that the acts mentioned have occurred by the time of trial; neither directly proves their actual occurrence. A jury could infer from a legislator's statement that he planned to introduce a bill the conclusion that he in fact did so; conversely, a statement that a bill was introduced in the past could be deliberately false or mistaken.

In sum, the admissibility of critical evidence in a constitutionally permissible prosecution should not depend on so fortuitous a factor as whether the events recounted by the evidence occurred before or after the performance of a legislative act. Such a rule would impose heavy costs on the ability of the criminal justice system to prosecute and punish corruption of the legislative process, and it would do so without any measurable gain to the goal of legislative independence that informs the Speech or Debate Clause.

B. Even if the argument just advanced is wrong and the government's proffered testimony does entail inquiry into legislative acts, the evidence should nevertheless be admitted in a prosecution under 18 U.S.C. 201, because that provision is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). *Johnson* was the first case in which this Court gave

detailed consideration to the Speech or Debate Clause in the context of a criminal prosecution. The Court invalidated a Congressman's conspiracy conviction because the criminal charges were based in large part on the defendant's delivery of a speech on the floor of Congress, and the proof at trial involved extensive questioning of the Congressman and others about the preparation and motivation of the speech. The Court could not be sure that Congress intended to cover such conduct with a general criminal statute prohibiting agreements to defraud the United States.

But, the Court said, the situation might be different if it were clear that Congress had decided to regulate the conduct of its Members through the use of the criminal justice system and had passed a narrowly drawn statute to accomplish that end. Section 201 is such a statute. It unquestionably applies to Members of Congress and the "official acts" that it covers clearly include action in Congress by Senators and Representatives.

Under Article I, Section 5 of the Constitution, Congress has the power to punish its own Members. If it chooses to enlist the aid of the executive and the courts in exercising this disciplinary power, no constitutional provision is violated. *Burton* v. *United States*, 202 U.S. 344, 365-370 (1906). The rule should not be different merely because the conduct that Congress wishes to regulate by a criminal statute is related to the legislative process.

Thus, even if we are incorrect in our lead argument and the government's proposed proof of the

offenses charged in this case would involve inquiry into respondent's legislative acts, the critical fact is that Congress as an institution has decided such inquiry is acceptable. Unless one assumes that Congress in making bribery of its Members a federal offense expected that proof of such an offense would be barred in many common situations, the conclusion must be that Congress thought the introduction of relevant and probative evidence in cases such as this would not violate the Constitution. Congress's legislatively expressed views on the proper interpretation of the Speech or Debate Clause and the Punishment Clause are entitled to respect from the coordinate branches. If Congress has concluded that legislative independence would not be impaired by prosecutions like the present one, the other branches should not reject that judgment. This is particularly so because if Congress has miscalculated, and prosecutions under Section 201 do threaten the freedom and integrity of legislative deliberations, Congress itself has the power to correct its error by amending the statute.

Deference to the congressional endorsement of bribery prosecutions, even those that may inquire into legislative acts, is also appropriate because of the advantages for Congress that reliance on the criminal justice system produces. The danger of politically motivated prosecutions and punishment is sharply decreased, and Congress can avoid time-consuming disciplinary proceedings and devote its attention to the business of making the laws. Moreover, both the

substantive and procedural standards provided by the criminal law offer Members of Congress more protection than they would enjoy if they were subjected to disciplinary action in the House or the Senate.

II.

In his cross-petition, respondent has presented several attacks on the validity of the indictment. His contentions lack merit, and the procedural posture in which they reach the Court reinforces the conclusion that he is not entitled to relief.

A. Respondent contends that the first four counts of the indictment are invalid on their face because they seek to impose liability for legislative acts, in violation of the Speech or Debate Clause. This argument is insubstantial in light of *Brewster*, which upheld charges not materially distinguishable from those in this case.

Attempting to distinguish the indictment here from the one sustained in *Brewster*, respondent argues first that the present indictment specifies that private immigration bills on behalf of particular individuals were introduced in exchange for bribes, whereas the indictment in *Brewster* referred only to the "performance of official acts in respect to [the Senator's] action, vote, and decision on postage rate legislation." In respondent's view, the mere mention of particular legislative acts in the indictment renders it invalid under the Speech or Debate Clause. But the indictment in *Brewster* plainly indicated that the defendant Senator had performed legislative acts,

and this Court found the indictment acceptable. The Court correctly indicated that, because the government need not prove any legislative acts in order to prove that a Member of Congress received a bribe, any mention of such acts in an indictment is surplusage and may be disregarded without consequence.

B. Respondent also makes the broader contention that the indictment against him is invalid because it was returned by a grand jury that had considered acts and materials protected by the Speech or Debate Clause privilege. According to this argument, the indictment would be improper even if it did not list specific legislative acts, because the Speech or Debate Clause precludes any grand jury from considering acts that are immune from prosecution under the Clause.

There are several answers to respondent's position. First, he may be wrong in assuming that a grand jury's consideration of his legislative acts is improper under the Speech or Debate Clause. A grand jury proceeding is not adversarial and as long as respondent himself was not compelled to testify, the grand jury's inquiry into his introduction of private immigration bills may not have been "questioning" him for his Speech or Debate within the meaning of the constitutional provision. Second, respondent himself provided the grand jury with much of the evidence that it received concerning his legislative acts. He cannot now object to the indictment on the ground that the grand jury received the testimony and documents that he voluntarily produced. Finally, even if the grand

jury's consideration of respondent's legislative acts was improper, it would not justify dismissal of the indictment. Under this Court's decisions, it is well settled that an indictment that charges a valid offense and that is returned by a competent and unbiased grand jury is sufficient to call for a trial, regardless of the kind of evidence that persuaded the grand jury to indict.

C. Respondent's final attack on the indictment is an outgrowth of the court of appeals' ruling concerning the evidence that may be introduced by the government to prove the bribery offenses charged in the indictment. Assuming the ruling to be correct, respondent asserts that it constructively amends the indictment in a manner forbidden by both the Speech or Debate Clause and the Fifth Amendment.

The contention is groundless. The indictment against respondent has not been altered in any way. The elements of the bribery offenses that the government must prove are the same as they were prior to the evidentiary ruling now under review. The only evidence that has been excluded is evidence that refers to respondent's legislative acts, and, although those acts are mentioned in the indictment, the government need not prove them in order to establish the offenses charged.

D. Not only are respondent's asserted distinctions between the present indictment and the one upheld in *Brewster* insignificant, but he presents them in this Court on review of the court of appeals' discretionary refusal to grant a writ of mandamus to pre-

vent trial on the indictment after the district court denied respondent's motion to dismiss. The extraordinary remedy of mandamus is not a substitute for direct appeal and ordinarily is granted only to correct clear abuses of power, in situations where other remedies are not available. Respondent's complaints about the validity of his indictment will be subject to full appellate review on appeal from a final judgment of conviction—if respondent is ever convicted in the district court. Even if an interlocutory appeal from the district court's pretrial order was available to respondent under this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), he did not file his request for review within the jurisdictional time limits established by Fed. R. App. P. 4(b). He should not be permitted to use a petition for a writ of mandamus in order to cure a failure to file a timely appeal.

III.

By testifying and producing documents before the grand jury that would otherwise have been privileged as legislative matter, respondent waived his Speech or Debate Clause privilege with respect to subsequent consideration of that matter by the grand jury and its introduction into evidence at trial on an indictment arising out of the grand jury's investigation.

Respondent's cooperation with the grand jury was wholly voluntary, as the district court found. He testified and produced documents only after being informed that he was not required to do so. He also stated that he would request no immunity and would

not plead the Fifth Amendment under any circumstances. The district court found that respondent was aware of his Speech or Debate Clause privilege when he first appeared before the grand jury, and respondent has not contested that finding.

Notwithstanding the undisputed finding that respondent testified voluntarily before the grand jury and did so with knowledge of his evidentiary privilege, the district court and the court of appeals ruled that he did not waive his privilege. The courts held that a valid waiver of the protections conferred by the Speech or Debate Clause can be found only where a legislator has expressly waived his immunity for the precise purpose for which the government seeks to use evidence of his legislative acts. This decision was erroneous.

Respondent's voluntary testimony and production of documents, given with full knowledge of his right not to cooperate with the grand jury's investigation, are sufficient to satisfy even the most stringent of the waiver standards heretofore used by this Court. Assuming "an intentional relinquishment or abandonment of a known right or privilege" must be shown to establish a waiver of the Speech or Debate Clause, the test was met here.

Respondent argues, however, that an individual Senator or Representative cannot waive the Speech or Debate privilege. In addition, he strongly implies that neither Congress as a whole nor a single House can waive the protection of the Clause. In effect respondent's position is that a Congressman may not

introduce evidence of his legislative acts even if he wishes to do so. The Court should not endorse this novel suggestion.

If a Member of Congress himself decides to present evidence of his legislative acts to a jury, he should not be prevented from doing so. The Congressman's free choice, made with knowledge of his privilege, guarantees that legislative independence will not be jeopardized. No prohibition on waiver can be found in the language or history of the Speech or Debate Clause, and judicial adoption of such a rule would not advance the Clause's purpose.

The reasons provided by the courts below for their insistence on an especially strict waiver standard do not support departure from the more familiar "knowing and intelligent" test. The government's argument here is not that a Member of Congress waives his evidentiary privilege whenever he discusses his legislative acts outside Congress. We contend only that a valid waiver can be found in respondent's voluntary production of evidence before the grand jury after he was informed of the nature of its investigation and advised of his rights. Nor was it a prerequisite to an effective waiver that respondent be advised that he was a target of the grand jury's investigation. His right to refuse to submit to questioning about his legislative acts was the same whether or not he faced possible indictment; *Gravel* v. *United States*, 408 U.S. 606 (1972), is not to the contrary. The strict standard fashioned by the district court and the court of appeals is thus not necessary to protect

Members of Congress from inadvertent waivers or to safeguard communications with constituents.

Finally, even if this Court should rule that respondent's voluntary testimony before the grand jury is insufficient to waive his privilege with respect to the subsequent use of that evidence at trial, it should still find a valid waiver with respect to the grand jury's consideration of respondent's legislative acts. Whether the proper term be waiver or estoppel, respondent should not now be permitted to benefit by attacking his indictment on the basis of the grand jury's examination of testimony and documents that he himself provided.

ARGUMENT

I

THE SPEECH OR DEBATE CLAUSE DOES NOT BAR THE ADMISSION OF ALL EVIDENCE THAT MAY TEND TO SHOW THE PAST PERFORMANCE OF A LEGISLATIVE ACT

In a bribery prosecution of a Member of Congress, the admissibility of evidence that incidentally refers to a past legislative act can be sustained on either of two theories. The first theory, on which we primarily rely, follows the line of reasoning employed by this Court in *United States* v. *Brewster*, 408 U.S. 501 (1972). Briefly stated, the argument is that when the proposed basis of a Congressman's criminal liability is conduct not protected by the Speech or Debate Clause, the government should be permitted to prove

the criminal charges with evidence of acts and statements that are not themselves part of the legislative process, even if one or more of them refers to a past legislative act.

In developing this argument, we begin with a review of the relevant history of the Speech or Debate Clause. There follows a detailed discussion of this Court's decisions in *United States* v. *Johnson*, 383 U.S. 169 (1966), and *United States* v. *Brewster*, *supra*, the only cases in which the Court has confronted assertions of legislative immunity in the context of a criminal prosecution. The exposition of the first theory concludes with a description of the substantial policy considerations that militate in favor of admitting the kind of evidence suppressed in this case by the district court and the court of appeals.

The second theory on which the introduction of evidence referring to past legislative acts can be justified was identified but not evaluated by the Court in *United States* v. *Johnson*, *supra*. *Johnson* suggested that a criminal prosecution of a Member of Congress, even if it entails inquiry into legislative acts or motives, may nonetheless be consistent with the Speech or Debate Clause if it is "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185. As the government argued in *Brewster*, the bribery provision in the federal criminal code, 18 U.S.C. 201, is just such a narrowly drawn statute, and, accordingly, a charge that a Senator or Representative violated that law

should be provable with evidence that refers to past legislative acts. Because this argument was fully treated in the government's brief in *Brewster* and the Court found no need to reach it in that case, we repeat it here only in summary form and incorporate by reference the more extensive presentation in the earlier brief.

A. When a Member of Congress is charged with a criminal offense, proof of which does not require a showing of any legislative act, probative evidence should not be excluded solely because it may refer to the past performance of a legislative act.

1. The history of the Speech or Debate Clause indicates that the Clause is not concerned with evidentiary references to past legislative acts, but rather is designed to preclude inquiry by the Executive and Judicial Branches into the substance of legislative activity.

The Speech or Debate Clause was intended to protect the integrity and independence of Congress and to reinforce the separation of powers "so deliberately established" in the American constitutional scheme. *United States* v. *Johnson*, *supra*, 383 U.S. at 178. See also *United States* v. *Brewster*, *supra*, 408 U.S. at 507, 524. The history of the Clause has been canvassed in considerable detail in the Court's opinions and in previous government briefs. See *United States* v. *Johnson*, *supra*, 383 U.S. at 178-183; *United States* v. *Brewster*, *supra*, 408 U.S. at 507-509, 513-521; Brief for the United States in *Johnson* (No. 25, 1965 Term) 19-30; Brief for the United States in *Brewster*

(No. 70-45, 1971 Term) 12-22. Only a few of the more fundamental points need be repeated here.

a. The legislative privilege developed in England as an outgrowth of the long struggle for supremacy between Parliament and the Crown. Although the first assertions of legislative immunity by Members of Parliament came in response to private attempts to enlist the aid of the lower courts in disputes concerning legislative acts,[7] the Tudor and Stuart monarchs provided the major impetus for the immunity's

[7] An early example is *Strode's Case*, in which a member of the House of Commons was prosecuted in a local court for introducing legislation regulating certain abuses in the Cornwall tin industry. Strode was convicted and imprisoned for violating a local law making it an offense to obstruct tin mining. He petitioned Parliament for relief, and Parliament passed a special bill ordering his release and declaring that any accusations or punishments based on "any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament" shall be "utterly void and of none effect." See *United States* v. *Johnson, supra,* 383 U.S. at 182 n.13. One scholar, noting Parliament's role as England's highest court, has explained the affair as nothing more than a manifestation of "the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court." Neale, *The Commons' Privilege of Free Speech in Parliament,* in 2 *Historical Studies of the English Parliament* 147, 160 n.45 (E. Fryde & E. Miller ed. 1970), quoted in Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1122-1123 n.47 (1973); see also *id.* at 1125 n.58. Years later, however, Parliament cited its act in *Strode's Case* as one of the first general assertions by the legislature of its right to be free from external interference in the performance of the lawmaking function. Although Parliament's characterization of its earlier action may have been tactically effective, it was almost certainly historically inaccurate.

development. On many occasions when the Crown objected to legislative action by one or more Members of Parliament, the English monarchs tried to "utilize[] the criminal and civil law to suppress and intimidate critical legislators." *United States* v. *Johnson, supra,* 383 U.S. at 178. The important feature of these incidents is that they involved efforts by the Crown to control and restrict legislative activity and, frequently, to impose a penalty for a legislator's conduct in his legislative role, *e.g.*, the introduction of a bill or the giving of a speech.

Examples from the 16th and 17th centuries are abundant. In 1558 Queen Elizabeth I tried to forbid discussion in Parliament on the subject of her marriage and the royal succession. Paul Wentworth led a vigorous debate on whether such restraints violated the liberties of the House of Commons, and the Queen was forced to yield. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts,* 2 Suffolk U. L. Rev. 1, 7 (1968). In 1571, the Queen restrained a member of Commons from attending sessions of Parliament because he had introduced a measure to reform the Book of Common Prayer (*ibid.*). In 1575, the Queen ordered the House of Commons to cease consideration of a bill concerning the rites and ceremonies of the church. In the midst of a speech defending the prerogatives of Parliament, Peter Wentworth was taken into custody; eventually, he was imprisoned in the Tower of London (*id.* at 8-9). He

was again imprisoned in the Tower 12 years later, when he presented to the Speaker of the House of Commons a long list of questions regarding the right of freedom of speech in Parliament (*id.* at 9). A similar punishment was ordered by the Queen in 1592 for the sponsor of a bill that provoked debate about the shortcomings of the ecclesiastical courts (*ibid.*). And, in 1621, members of the House of Commons were incarcerated for refusing to heed King James I's order to discontinue discussion of the marriage he had arranged between his young son Charles and the infant Spanish princess (*id.* at 10-11). Finally, in one of the most celebrated cases of all, Sir John Eliot and two other members were prosecuted in 1629 for speeches in Parliament that King Charles I regarded as libelous or seditious. They were imprisoned and heavily fined; years later, Parliament declared the judgments against them illegal and a breach of parliamentary privilege (*id.* at 11-12; *United States* v. *Johnson, supra,* 383 U.S. at 181).

This series of skirmishes between Crown and Parliament demonstrates that the principle of legislative immunity was initially asserted and ultimately recognized in the context of the monarchy's efforts to limit the scope and substance of legislative activity. Not surprisingly, occupants of the British throne would have preferred that Parliament forbear criticism of the reigning monarch's policies and behavior and avoid altogether certain subjects said to be the exclusive preserve of the Crown. Parliament's success-

ful rejection of the Crown's efforts to circumscribe the legitimate areas of legislative concern led to the inclusion in the English Bill of Rights of the provision from which the Speech or Debate Clause is derived.[8] Particularly because the Clause was adopted by the constitutional convention without debate or opposition (see *United States* v. *Johnson, supra,* 383 U.S. at 177), its proper interpretation and application require reference to the historical record and to the specific practices that the Clause and its English counterpart were designed to prevent. Decisions concerning the scope of the Speech or Debate immunity and the coverage of the accompanying evidentiary privilege should reflect the Clause's purpose of insulating legislative activity from outside interference, particularly interference by an unfriendly executive or a hostile judiciary.[9]

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[8] The Bill of Rights provided that "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." See *United States* v. *Johnson, supra,* 383 U.S. at 178.

[9] One of the Framers of the Constitution stated the purpose of the Speech or Debate Clause in the following frequently-quoted language:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

2 *The Works of James Wilson* 38 (J. Andrews ed. 1896).

b. By the time the Framers of the American Constitution met in Philadelphia, parliamentary privilege had been formally established in England for nearly a century. During that period the privilege was often abused, and the men who adopted the Speech or Debate Clause in 1787 were acutely aware of the new problems that recognition of parliamentary independence had created. The Framers did not intend to perpetuate in the colonies the kinds of abuses of legislative privilege that had arisen in England, and the Speech or Debate Clause should be construed with this historical lesson in mind.

The abuses that the Framers sought to avoid were of several kinds. First, as this Court observed in *Watkins* v. *United States*, 354 U.S. 178, 188 (1957), both Houses of Parliament "claimed absolute and plenary authority over their privileges," the right to "declare what those privileges were or what new privileges were occasioned, and * * * [to] judge what conduct constituted a breach of privilege." This separation of the law of Parliament (*lex parliamenti*) from the general law of the land (*lex terrae*) precluded judicial review of the legislature's exercise of its contempt power and permitted Commons to "take cognizance of almost any offence under the *lex parliamenti*, punish it as a breach of privilege, and thus invade the field of jurisdiction that rightly belonged to the judges of the *lex terrae*." C. Wittke, *The History of English Parliamentary Privilege* 200 (1921).[10]

[10] For example, Commons successfully asserted the power to punish trespass on the estates of members, theft of goods belonging to members or their servants, and illegal arrest of members' servants. C. Wittke, *supra*, at 200; see also *id.* at 32, 45-47.

Moreover, the absolute independence asserted by Parliament permitted members of the legislature to use or sell their privilege for personal gain. Members of Commons and their servants were declared to be outside the reach of the common law courts during the time that Parliament was sitting. This led to the sale of "protections" issued under the seal of particular members, providing in effect that named persons were servants of the member and should be free from arrest, imprisonment, and civil proceedings during the term of Parliament. C. Wittke, *supra*, at 39-44, 47-48; T. Taswell-Langmead, *English Constitutional History* 580 (11th ed. T. Plucknett 1960).

Finally, because the Crown was no longer able to impose its will on Parliament by threat, intimidation, or actual punishment, British monarchs in the late 17th century and throughout the 18th century frequently sought to buy votes. As one English historian has written:

> Vulgar bribes were given—directly and indirectly—for political support. * * * In the reigns of the Tudors and the first two Stuarts, prerogative had generally been too strong to need the aid of such persuasion; but after prerogative had been rudely shaken by the overthrow of Charles I., it was sought to support the influence of the Crown by the subtle arts of corruption. Votes which were no longer to be controlled by fear, were purchased with gold.

1 T. May, *The Constitutional History of England* 252-253 (F. Holland ed. 1912) (footnote omitted). See also *id.* at 253-256; 1 W. Anson, *The Law and Custom of the Constitution* 331-342 (3d ed. 1897); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L.J. 335, 337 n.10 (1965); *United States* v. *Brewster*, *supra*, 408 U.S. at 545 (Brennan, J., dissenting). Similarly, Holdsworth reports that George III needed to bribe members of Commons in order to maintain a majority in that House in support of the King's policies in the Revolutionary War. 10 *Holdsworth's History of English Law* 104-105 (1938).

The most notorious example of the Crown's corrupt control over Parliament was that body's treatment of John Wilkes, a member of the House of Commons whose struggles with George III and the King's legislative adherents lasted for nearly 20 years and aroused sustained interest in the colonies.[11] In 1763 Wilkes gave a speech in Parliament strongly criticizing a recent peace treaty with France. For this and other indiscretions in print, he was arrested and confined in the Tower of London. The Lord Chief Justice ordered his release on the ground that his arrest violated the parliamentary privilege. Influenced by the King's ministers, the House of Commons voted to expel Wilkes from Parliament. He fled to France and in his absence was convicted of

[11] This Court considered the Wilkes case in some detail in *Powell* v. *McCormack*, 395 U.S. 486, 527-528 (1969).

seditious libel. After his return to England in 1768, Wilkes was reelected to the House of Commons several times, but his erstwhile colleagues steadfastly refused to seat him. Rehabilitation finally came in 1782, when the House passed a resolution expunging the records of Wilkes' expulsion and declaring that the earlier actions of the House were " 'subversive of the rights of the whole body of electors of this kingdom.' " *Powell* v. *McCormack*, 395 U.S. 486, 528 (1969), quoting 22 Parl. Hist. Eng. 1411 (1782).

The Framers of the Speech or Debate Clause were familiar with this history of the Crown's corrupt influences over the legislature and the abuse of parliamentary privilege for the members' personal benefit. The constitutional provision here at issue was designed to guarantee legislative independence, but not to expand legislative power or free members of Congress from public accountability for their criminal misdeeds. Indeed, one of the primary goals of the Framers was to confine legislative prerogative within acceptable bounds. James Madison wrote:

> The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.
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> * * * But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently

> numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The Federalist No. 48, 343-344 (B. Wright ed. 1961). Thomas Jefferson expressed similar sentiments. See T. Jefferson, *Notes on the State of Virginia* 120 (W. Peden ed. 1955); *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n.4 (1951). See also *United States* v. *Johnson*, *supra*, 383 U.S. at 178-179.

Proper application of the Speech or Debate Clause accordingly requires an appreciation of the abuses of parliamentary privilege and the excesses of legislative power that the Framers of the American Constitution hoped to avoid. As this Court said in *United States* v. *Brewster*, *supra*, 408 U.S. at 508 (footnote omitted):

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

c. The third aspect of the historical background of the Speech or Debate Clause that deserves emphasis in the present context is the role of Parliament as England's highest court. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 183-184 (1881). Parliament's reservation to itself of the supreme judicial authority accounts in large measure for the English legislature's insistence that it alone can determine the proper scope of parliamentary privilege. "The very fact of the supremacy of Parliament as England's highest tribunal explains the long tradition precluding trial for official misconduct of a member in any other and lesser tribunal." *United States* v. *Brewster*, *supra*, 408 U.S. at 518. See also *id.* at 520 n.15. Parliament's judicial tradition has an important consequence in addition to the legislature's retention of the exclusive right to punish its members for official misconduct.[12] Because Parliament regards itself as the sole guardian of its privilege, the English legislature claims the authority to determine when its freedom of speech or debate has been violated and then to imprison the offender for contempt. Such action, at least in theory, is not subject to judicial

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[12] The absence of bribery prosecutions of Members of Parliament in the Crown courts is explained by the fact that no statute exists in England rendering the receipt of bribes by Members of Parliament a criminal offense.

review.[13] See Cella, *supra*, 2 Suffolk L. Rev. at 15-16; Note, *supra*, 75 Yale L.J. at 337-338.

This limitation on judicial review of assertions of legislative privilege has never been accepted in the United States. "Unlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review."

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[13] Perhaps the most concise description of the current status of Parliament's exclusive privilege jurisdiction is contained in T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 200-201 (19th ed. 1976) (footnotes omitted):

> The House of Commons claims that its admitted right to adjudicate on breaches of privilege implies in theory the right to determine the existence and extent of the privileges themselves. It has never expressly abandoned its claim to treat as a breach of privilege the institution of proceedings for the purpose of bringing its privileges into discussion or decision before any court or tribunal elsewhere than in Parliament. In other words, it claims to be the absolute and exclusive judge of its own privileges, and that its judgments are not examinable by any other court or subject to appeal.
>
> On the other hand, the courts regard the privileges of Parliament as part of the law of the land, of which they are bound to take judicial notice. They consider it their duty to decide any question of privilege arising directly or indirectly in a case which falls within their jurisdiction, and to decide it according to their own interpretation of the law.
>
> The decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the House by the courts. Thus the old dualism remains unresolved. In theory "there may be at any given moment two doctrines of privilege, the one held by the courts, the other by either House, the one to be found in the Law Reports, the other in Hansard; and there is no way of resolving the real point at issue should the conflict arise."

Watkins v. *United States*, 354 U.S. 178, 192 (1957); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821). Moreover, this Court has indicated that Congress's power to punish for contempt is not as broad as Parliament's, but rather is restricted to those occasions on which the acts complained of "obstruct the performance of the duties of the legislature." *Jurney* v. *MacCracken*, 294 U.S. 125, 148 (1935); *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189-190.

As the Court recognized in *Brewster*, 408 U.S. at 508, 518-519, the differences between parliamentary privilege and congressional privilege are relevant to the question whether courts may entertain criminal prosecutions of legislators for bribery. *Brewster*'s holding that the Speech or Debate Clause does not prohibit such prosecutions under 18 U.S.C. 201 rests in part on the conviction that Congress, unlike Parliament, "is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." 408 U.S. at 518. See also *United States* v. *Brown*, 381 U.S. 437, 445 (1965). At least one commentator has observed that results similar to that in *Brewster* have been reached in United Kingdom countries other than England, "where provision for legislative free speech or debate exists but where the legislature may not claim a tradition as the highest court of the realm * * *." Note, *supra*, 75 Yale L.J. at 338. See *id.* at 338-339, and cases there cited. See also *United States* v. *Johnson*, *supra*, 383 U.S. at 180 n.9, citing the same group of cases.

The principal issue in the present case involves not immunity from prosecution but the scope of the evidentiary privilege conferred by the Speech or Debate Clause. The divergence of parliamentary and congressional privilege remains relevant, however. For if the Speech or Debate Clause permits American legislators, unlike their English counterparts, to be prosecuted for soliciting or receiving bribes in connection with their official duties, then the very same constitutional provision should not be construed to impose evidentiary restrictions that effectively foreclose the possibility of proving a bribery charge in the vast majority of cases, particularly where those restrictions do little to further the constitutional goal of legislative independence.

2. ***Prior decisions of this Court indicate that the Speech or Debate Clause privilege does not extend to statements made and acts occurring outside the legislative process, even where such acts or statements refer to past legislative acts or give rise to an inference that a particular legislative act has been performed.***

On two previous occasions in the last 15 years, this Court has reviewed cases involving allegations that Members of Congress received or agreed to receive bribes in return for being influenced in the performance of legislative acts. *United States* v. *Johnson*, *supra*; *United States* v. *Brewster*, *supra*. Although the evidentiary question here presented remains unresolved, the earlier decisions do provide some guidance on the scope of the Speech or Debate privilege.

Before turning to an examination of the relevant precedents, however, it may be useful to summarize briefly the kinds of evidence here at issue, so that discussion of previous cases can focus more sharply on the implications of earlier decisions for the present controversy.

a. Respondent has been accused of taking bribes in exchange for introducing private immigration bills in the United States House of Representatives.[14] Three kinds of evidence proffered by the government are now in dispute. First are the immigration bills themselves. See, *e.g.*, 78-349 Sp. App. 13. Second is correspondence between respondent and the persons for

[14] It perhaps should be explained at this juncture that the mere introduction of a private immigration bill confers a substantial benefit on the party for whom the bill is introduced. Passage of such a bill, of course, results in the lawful admission of an alien to permanent residence in the United States. See 78-349 Sp. App. 13. But the mere introduction of such proposed legislation, regardless of its fate in Congress, triggers an investigation by the Immigration Subcommittee of the Judiciary Committee of the House in which the bill is introduced. Reports on each private immigration bill are prepared by the Immigration and Naturalization Service and the State Department. As a general rule, persons who are the subject of private bills need not fear deportation or other enforcement action by the INS while the bills are pending in Congress. The process of committee consideration typically entails a period of several months, and even if a private bill is ultimately rejected, it will still have had the effect of significantly prolonging an alien's stay in the United States. Moreover, the additional time spent in this country as the result of a private bill may advance an alien's standing among applicants for permanent residence sufficiently that he will receive a permanent visa regardless of the final congressional action on his bill.

whom the bills were introduced and between respondent and his former administrative aide, DeFalco. See, *e.g.*, 78-349 Sp. App. 12, 15-25. This correspondence concerns the progress of the private immigration bills and the Immigration Subcommittee's request for supporting information to establish the hardship necessary for favorable action on the bills. Neither the bills nor the letters themselves contain any suggestion of illegal activity. They are neutral documents that simply witness respondent's efforts on behalf of some of his constituents. Respondent himself produced this documentary material in connection with his grand jury testimony.

The third and most important category of evidence that the district court and court of appeals suppressed is the testimony of various persons involved in the alleged bribery scheme, including persons for whom private immigration bills were introduced. The government's narrative offer of proof, reproduced in 78-349 Sp. App. 2-11, describes the testimonial evidence excluded by the courts below on the ground that it refers to a past legislative act or might support an inference that such an act occurred. This evidence may be divided into several subcategories: (1) testimony showing that payments were made to DeFalco or to respondent or for respondent's account, after private immigration bills were introduced; (2) statements that respondent or DeFalco demanded payment, and sometimes accompanied their demands with explicit declarations that the payment was sought in exchange for private bills already introduced; (3) testimony that respondent told beneficiaries of private bills that he had introduced bills on their behalf; (4) testimony that DeFalco told prospective beneficiaries of private bills that respondent had introduced such bills on behalf of others; and (5) testimony that, after the appearance of a newspaper article reporting that aliens had paid for private bills introduced by respondent, DeFalco visited persons for whom bills had been introduced and told them not to cooperate with the Federal Bureau of Investigation.

The courts below ruled that the introduction of any or all of this evidence would violate the Speech or Debate Clause, because the evidence would indicate to the jury that respondent performed particular legislative acts, *viz.*, that he introduced private immigration bills in the House of Representatives. In support of this result, the district court and court of appeals relied on *Johnson* and *Brewster*. Careful examination of those decisions, however, reveals that they do not adopt the expansive reading of the Speech or Debate Clause urged by respondent, but instead tie the scope of the privilege closely to "what is necessary to preserve the integrity of the legislative process." 408 U.S. at 517.

b. *United States* v. *Johnson*, *supra*, involved the indictment and conviction of a member of the House of Representatives for conspiracy to defraud the United States, in violation of 18 U.S.C. 371. The conspiracy count alleged that Representative Johnson agreed to use his influence to attempt to persuade the

Justice Department to dismiss a mail fraud indictment against a savings and loan institution and its officers. The indictment further alleged that, as part of the conspiracy, Johnson agreed to give a speech in Congress defending the stability and integrity of Maryland's independent savings and loan associations; he also agreed to help obtain 50,000 reprints of the speech for distribution to the general public and to members of the Maryland General Assembly. In return, he received substantial compensation.

At trial the government introduced into evidence one of the reprints of Johnson's speech.[15] Parts of the text had been underlined by the savings and loan company in order to encourage persons to whom the reprints were distributed to become depositors. Johnson himself introduced into evidence an official copy of the speech taken from the Congressional Record. Johnson testified in his own defense and was cross-examined at some length about the content of the speech, his reasons for giving it, and the way in which it was prepared. See 383 U.S. at 174 n.5, 176 n.7. In addition, a government witness, a public relations representative for an organization of Maryland savings and loan associations, was questioned about the preparation of the speech and his role in providing information for Johnson's administrative assistant, who was primarily responsible for drafting the text. The administrative assistant and one of Johnson's co-defendants were also cross-examined concerning the speech. See *id.* at 173 n.4.

This Court upheld the reversal of Johnson's conviction on the conspiracy count. The Court emphasized that the charge against Johnson was conspiracy to defraud the United States, not conspiracy to commit any substantive offense.[16] As a consequence, the Court ruled, proof of the government's case inevitably entailed inquiry into the decision to make the speech, the motivation for that decision, and the content and preparation of the speech. 383 U.S. at 177, 180, 184.

[15] The reprints were prepared by the Government Printing Office at the request of Representative Johnson's office. They were paid for by the savings and loan company that was named as a defendant in the mail fraud indictment.

[16] This is not to say, of course, that Johnson's conduct did not violate any of the substantive provisions of the federal criminal code and would not have justified an accusation that he conspired to commit such violations. For reasons that are not clear, Johnson was not indicted for conspiracy to commit a substantive offense. He was indicted and convicted on one count of conspiracy to defraud the United States and also on seven counts of violating the federal conflict-of-interest statute, 18 U.S.C. (1964 ed.) 281 (now 18 U.S.C. 203), by taking money in exchange for his efforts on behalf of the savings and loan company. The court of appeals held that, although there was sufficient independent evidence to support Johnson's convictions on these counts, the convictions were tainted by the introduction of evidence concerning the speech and its motivation, authorship, and accuracy. Accordingly, the court vacated the convictions and remanded for a new trial. 337 F.2d 180, 204 (4th Cir. 1964). In part because the government did not contest this aspect of the court of appeals' decision (see 383 U.S. at 185-186 & n.16), this Court upheld the reversal of the conflict-of-interest counts. On remand, Johnson was again convicted on all seven of these counts. The court of appeals affirmed, and this Court denied certiorari. 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970).

In relevant part, the government's conspiracy theory was that Johnson had agreed to defraud the United States by delivering a paid speech in the House of Representatives. This required the government to prove not only that Johnson took money in return for the speech, but also that he intended to defraud the United States by doing so. The indictment did not charge simply that Johnson received or agreed to receive money in return for being influenced in the performance of a legislative act (see 18 U.S.C. 201(c)) or because of a legislative act performed or to be performed by him (see 18 U.S.C. 201(g)).[17]

[17] The proposed indictment in *Ex parte Wason*, L.R. 4 Q.B. 573 (1869), was similar to the one found deficient in *Johnson*. The facts of *Wason* are complicated. In February 1867 Wason gave to Earl Russell a petition addressed to the House of Lords. The petition charged that the Lord Chief Baron, in his previous position as the Queen's Counsel, made a false statement before a committee of the House of Commons sitting as a judicial tribunal. The petition asked the House of Lords to investigate this charge and, if it found the charge accurate, to commence proceedings to remove the Lord Chief Baron from his judicial post. Earl Russell kept his promise to present the petition to the Lords, but he, the Lord Chief Baron, and Lord Chelmsford allegedly conspired to prevent the petition from being granted by falsely stating to their colleagues that Wason's charge was untrue. Wason then appeared before a local police magistrate and sought to prefer an indictment against Earl Russell, the Lord Chief Baron, and Lord Chelmsford for conspiring to "prevent the course of justice, and to injure and prejudice a third party." The magistrate concluded that the facts alleged did not state an indictable offense and the Court of Queen's Bench agreed.

The court held that the prospective defendants could not be prosecuted for conspiring to deceive the House of Lords, because "statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person." 4 Q.B. at 576. The alleged offense was nothing more than an agreement to perform a legislative act, and like the act itself, an agreement to perform it or an attempt to perform it could not be the subject of a criminal charge.

By contrast to the proposed indictment in *Wason*, the indictment in the present case does not seek to treat as a crime behavior that is merely an inchoate version of a legislative act. Instead the counts here under attack charge three substantive offenses and an agreement to commit those offenses, all of which are completely independent of the actual performance of any legislative act. Thus, although the proposed indictment in *Wason* suffered from much the same defect that the Court found objectionable in *Johnson*, no such shortcoming afflicts the indictment in the controversy now before the Court.

The Court carefully limited its ruling to the particular conspiracy count at issue.[18] 383 U.S. at 184-185. The Court stressed the narrowness of its holding (*id.* at 185):

> Our decision does not touch a prosecution which, though as here founded on a criminal statute of

[18] The Court acknowledged that the remaining allegations in the conspiracy count might form the basis for a conviction on the theory that Johnson agreed to defraud the United States by contacting various Justice Department officials in an attempt to procure the dismissal of the mail fraud indictment against the savings and loan company and its officers. The Court therefore remanded for a new trial on the conspiracy count, "wholly purged of elements offensive to the Speech or Debate Clause" (383 U.S. at 185). On remand, the government did not object to Johnson's motion to dismiss the conspiracy count, and the district court granted the motion. 419 F.2d at 58.

> general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.

In addition, the Court reserved judgment on whether it would reach a similar result if a Congressman were prosecuted under "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" (*ibid.*). Prosecution under such a statute, the Court suggested, might be permissible even if it did involve "inquiry into legislative acts or motivations" (*ibid.*).

As this review of *Johnson* demonstrates, that decision does not establish the inadmissibility of the government's proffered evidence in the present case. The Court in *Johnson* disapproved a criminal charge that could only be substantiated through detailed questioning about a particular legislative act. The Court also found impermissible the cross-examination of Representative Johnson and others about the motives for the speech and its method of preparation. The Court did not state or imply that evidence referring to the past performance of a legislative act by a Member of Congress is *ipso facto* inadmissible in a criminal trial of that Congressman.[19] On the contrary, the Court specifically said (383 U.S. at 185) that its decision

[19] Indeed, in *Johnson* itself, the Court did not criticize the admission of evidence that Johnson received payments from the savings and loan company he allegedly agreed to help. Under the view adopted by the district court in the present case, such evidence should have been excluded because it might have given rise to an inference that Johnson had previously performed a legislative act for the company.

had no bearing on a prosecution in which the legislative acts of a Congressman and his motives for performing them are not drawn into question.

This is just such a case. Proof of the bribery charges against respondent does not require evidence that respondent introduced a private immigration bill or performed any other legislative act. The government does not need to prove the contents of bills sponsored by respondent, and it does not need to examine respondent or any other witness about the reasons for respondent's conduct in Congress. Where proof of the offense charged does not necessitate proof of a legislative act and the motivation therefor, *Johnson* does not forbid the introduction of evidence that incidentally refers to a past legislative act. *Johnson* simply does not address evidentiary questions arising in connection with an indictment like that at issue here.

The concern of the Court in *Johnson*, like the concern of the Speech or Debate Clause itself, was with accusations and trials that call legislators to account for what they have done in Congress. The indictment returned against respondent contains no such charges, and introduction of the evidence offered by the government will not involve the kind of inquiry condemned in *Johnson*. At most, the evidence will indicate to the jury that respondent performed a legislative act. This will violate neither the letter nor the spirit of *Johnson*. *Johnson* found fault not with a simple showing that a Congressman gave a speech, but with the government's attempt to impose criminal

liability on the basis of that act and to question the Congressman and others about the act's background and motivation. No such attempt is involved here.

c. *United States* v. *Brewster, supra,* confirms the accuracy of this description of the ruling in *Johnson.* The indictment in *Brewster* charged a former United States Senator with four counts of receiving money in return for being influenced in the performance of a legislative act, in violation of 18 U.S.C. 201(c), and one count of receiving money for legislative acts previously performed, in violation of 18 U.S.C. 201 (g).[20] The indictment alleged that Senator Brewster received $24,500 from a representative of Spiegel, Inc., a large mail-order firm, in return for votes and other official actions in connection with postage rate legislation pending in Congress. On Brewster's motion, the district court dismissed all five counts against the former Senator on the ground that the Speech or Debate Clause, as interpreted in *Johnson,* " 'constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.' " 408

[20] The difference between the two statutory provisions is that Section 201(c) requires a showing that the money was paid for the purpose of affecting the legislator's action, whereas Section 201(g) requires only that money be paid for or because of either a past or a future legislative act. It is thus no defense to an indictment under Section 201(g) to show that a particular act was or would have been performed regardless of the payment of money. In other words, Section 201(c) prohibits bribery, narrowly defined, and Section 201(g) prohibits the receipt of gratuities for official acts. See *United States* v. *Brewster,* 506 F.2d 62, 72 (D.C. Cir. 1974).

U.S. at 504. The government appealed directly to this Court and argued the case solely on the theory that *Johnson* did not determine the validity of the indictment against Brewster, because 18 U.S.C. 201 is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" (383 U.S. at 185), and therefore Brewster's prosecution was one of the kind that the Court in *Johnson* had explicitly left open for future consideration.[21]

This Court reversed the dismissal of the indictment without reaching the argument presented by the government. See 408 U.S. at 529 n.18. The Court held that the Speech or Debate Clause protects Members of Congress "from inquiry into legislative acts or the motivation for actual performance of legislative acts" (*id.* at 509, 525). But, the Court said, the Clause does not immunize "all conduct *relating* to the legislative process" (*id.* at 515, emphasis in original; see also *id.* at 513-514, 515-516). The Court stated that *Johnson* should be viewed as a "unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts" (*id.* at 512). And, the Court observed, in a comment with special relevance for the present case, "an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of

[21] The government's only discussion of the position ultimately accepted by the Court appeared in the Supplemental Memorandum for the United States on Reargument 3-8.

the defendant member of Congress or his motives for performing them'" (*id.* at 526).[22]

The Court thus regarded the indictment in *Brewster* as one belonging to a category that *Johnson* avowedly did not address. Notwithstanding the government's apparent assumption that *Johnson* required a broader reading, the Court in *Brewster* made clear that the only vice condemned in the earlier case was the government's detailed inquiry into legislative performance and the reasons therefor. Having emphasized the critical difference between the kinds of proof necessary to sustain the indictment in *Johnson*, on

[22] On remand the district court dismissed the count charging Brewster with an offense under Section 201(g). Ignoring part of this Court's decision (see 408 U.S. at 527), the district court ruled that the Section 201(g) count "related explicitly to payment for acts already performed, and thus the Government could not prove its case without proving the performance of legislative acts." *United States* v. *Brewster*, 506 F.2d 62, 65 n.4 (D.C. Cir. 1974). The case went to trial on the four counts charging Brewster with receiving bribes, in violation of Section 201(c). At the close of the government's case, the district court dismissed one of the counts for insufficient evidence. *Ibid.* The remaining three counts went to the jury, and the district court charged that the receipt of an illegal gratuity under Section 201(g) is a lesser included offense of bribery as defined in Section 201(c)(1). The jury returned a guilty verdict on three counts of receiving an illegal gratuity, in violation of Section 201(g). The court of appeals sustained the lesser included offense instruction but reversed the convictions on the ground that the district court's instructions did not adequately distinguish between criminal and innocent acceptance of funds. 506 F.2d at 78-83. In June 1975, Brewster entered a plea of *nolo contendere* to one count of accepting an illegal gratuity, in violation of Section 201(g).

the one hand, and *Brewster*, on the other, the Court responded to Mr. Justice White's criticism that the indictment in *Brewster* was defective because it charged offenses related to Brewster's action, vote, and decision on postage rate legislation. See 408 U.S. at 553-555 (White, J., dissenting).

The majority readily acknowledged the connection identified by Mr. Justice White, but it stated that this linkage did not invalidate the indictment because the government "need not prove any specific act, speech, debate, or decision to establish a violation of the statute under which [Brewster] was indicted" (408 U.S. at 527-528). In the same context, the Court also stated that "*Johnson* precludes any showing of how [Brewster] acted, voted, or decided" (*id.* at 527). On this latter sentence, respondent now places his principal reliance (Br. 33).

Respondent assigns the broadest possible meaning to the words "any showing" and contends that the Speech or Debate Clause, as construed in *Johnson* and *Brewster*, bars the introduction of any evidence that refers to a legislative act or suggests to the jury that a legislative act has been performed. The district court and court of appeals accepted this argument and excluded critical portions of the testimony and documentary evidence offered by the government (78-349 Pet. App. 26a-29a, 59a-62a). But respondent's position and the decisions below reflect a serious misunderstanding of *Brewster* and a willingness to isolate a single sentence from the majority opinion in that case and read it in such a way as to ob-

viate the remainder of the Court's thorough discussion.

In light of the Court's holding in *Brewster*, the words "any showing" cannot possibly mean "any evidence that refers to the performance of a legislative act." *Brewster* held that Congressmen may be prosecuted for receiving bribes in connection with their legislative acts. The Court stated unequivocally that inquiry into the purpose of a bribe " 'does not draw in question the legislative acts of the defendant * * * or his motives' " (408 U.S. at 526) and therefore does not violate the Speech or Debate Clause. The words "any showing" on the very next page of the Court's opinion could not have been intended to comprehend evidence that a bribe was actually paid or a demand for payment made after the performance of a legislative act. At minimum, the outcome in *Brewster* implies that evidence of actual payments or evidence of demands for payments by a Congressman is admissible under the Speech or Debate Clause, irrespective of whether the payments or demands occurred before or after the performance of a legislative act.

The contrary rule, advocated by respondent and adopted by the courts below, would produce absurd results. A Congressman could be indicted for taking a bribe, but a witness could not testify that he saw the Congressman take the bribe, because that might indicate to the jury that the Congressman had previously performed a legislative act. Likewise, a Congressman could be charged with soliciting a payment for some past favor in the House or Senate, but a

witness could not testify that he heard the Congressman commit the crime, because the request for a gratuity might reveal the earlier legislative conduct. This cannot be the law. If the Speech or Debate Clause permits the indictment of Congressmen for violating 18 U.S.C. 201(c) and 201(g), then surely it must permit the introduction of direct eyewitness testimony that the defendant committed the offense charged.

The opinion in *Brewster* also suggests that introduction of the remainder of the testimonial evidence offered by the government in the present case is consistent with the Speech or Debate Clause. Beneficiaries of private immigration bills and others involved in the alleged bribery scheme would testify that respondent and DeFalco reported to various persons that private bills for which payment had been made were in fact introduced. The government's witnesses would also testify that DeFalco sometimes demanded payment on behalf of respondent and that DeFalco advised persons who were the subject of private bills not to cooperate with federal investigators. All testimony of this kind, identified by italics in the government's narrative offer of proof (78-349 Sp. App. 2-11), concerns statements made outside Congress, statements that are not themselves legislative acts and are not part of "the *due* functioning of the [legislative] process" (408 U.S. at 516).

This Court in *Brewster* defined a "legislative act" as "an act generally done in Congress in relation to

the business before it" (408 U.S. at 512).[23] The Court carefully distinguished such acts from the broad spectrum of "entirely legitimate activities" that Members of Congress regularly perform for political rather than legislative reasons. These latter activities, in-

[23] The Court correctly stated that the coverage of the Speech or Debate Clause has consistently been limited to "those things generally said or done in the House or the Senate in the performance of official duties and * * * the motivation for those acts" (408 U.S. at 512). Earlier civil cases raising questions of legislative privilege may have created the impression that the Clause sweeps more broadly, but as the Court noted (*id.* at 515-516), the "sense of those cases, fairly read" is not contrary to the definition of "legislative act" set forth in *Brewster*. *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 204, for example, said that the Speech or Debate immunity extends to "things generally done in a session of the House by one of its members in relation to the business before it." This formulation is almost identical to the one used in *Brewster* and was applied in *Kilbourn* to cover the act of voting for a resolution of the House of Representatives, unquestionably a legislative act. In *Coffin* v. *Coffin*, 4 Mass. 1 (1808), a case construing a state constitution's counterpart to the Speech or Debate Clause, the court said that the provision embraced every "act resulting from the nature, and in the execution, of the office; * * * every thing said or done by * * * a representative, in the exercise of the functions of that office" (*id.* at 27). The court then held, somewhat incongruously, that the provision did not cover a private conversation between legislators on the floor of the state house of representatives concerning a subject that only moments earlier had been before the whole house for its consideration. See also *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 376, holding that state legislators enjoy a common law immunity from civil suit arising from conduct within "the sphere of legitimate legislative activity." The immunity was applied in *Tenney* to protect a state legislator's alleged harassment of a witness before a legislative hearing.

cluding "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress," cannot claim the protection of the Speech or Debate Clause. *Ibid.*; see also *Doe* v. *McMillan*, 412 U.S. 306, 313 (1973); *Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972) (the Clause reaches only matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House").

Respondent in the present case does not dispute the characterization of his own and DeFalco's statements outside Congress as nonlegislative acts. He apparently concedes that all the statements and events to which government witnesses would testify are not themselves legislative acts. He nonetheless argues that a large portion of the testimony must be suppressed because many of the conversations that would be recounted in the testimony refer to past legislative acts, *viz.*, the introduction of private immigration bills. This result is neither logically sound nor required by the language in *Brewster* stressed by respondent. Indeed, the *Brewster* opinion read as a whole supports the conclusion that the proffered testimony is admissible.

The district court and court of appeals, by adopting respondent's position, have injected a peculiar temporal element into the set of considerations relevant to the admissibility of evidence under the Speech or Debate Clause. If respondent is correct, and the Clause does prohibit introduction of any evidence that tends to prove the performance of a legislative act, then it should not matter whether a particular piece of evidence refers to a future or a past legislative act. The district court stated (78-349 Pet. App. 59a) that "the Speech or Debate Clause creates no impediment to the introduction of evidence of an agreement by [respondent] to perform *in futuro* a legislative act. What is forbidden is the introduction of evidence of his past performance of such an act." The source of this past-future distinction is unclear. If the words "any showing" in the *Brewster* opinion are to be read broadly to refer to any evidence tending to show the performance of a legislative act, then documents and testimony concerning events, statements, and agreements preliminary to the performance of such an act should be just as objectionable as evidence that the act has already occurred. While the statement "I will introduce your bill tomorrow" may be somewhat less probative of the fact of introduction of the bill than the statement "I introduced your bill yesterday," both statements tend to prove the performance of a legislative act, and neither constitutes conclusive proof (*i.e.*, the latter statement could be deliberately false or mistaken). In either case the jury is presented with some indication that

a Member of Congress did in fact engage in conduct, inquiry into which is barred by the Speech or Debate Clause. Cf. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295-296 (1892); *United States* v. *Annunziato*, 293 F.2d 373, 377-378 (2d Cir.), cert. denied, 368 U.S. 919 (1961); *United States* v. *Calvert*, 523 F.2d 895, 910 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976). The government's ability to introduce sufficient evidence to convict a Congressman on bribery charges should not depend on the fortuitous and logically insignificant matter of the timing of incriminating statements and events.

Apart from the logical flaws inherent in the past-future distinction, that criterion in any event does little to foster the objectives of the Clause as delineated in *Brewster*. *Brewster* settles that the Speech or Debate Clause does not immunize Congressmen from prosecution for receiving bribes to influence them in the performance of their legislative duties. The ultimate facts that the prosecution must prove in this case are that respondent accepted money with the knowledge that it was being paid to him for the purpose of influencing his official actions. The acts and conversations that the government seeks to introduce, and that the courts below have excluded, are probative both of the fact of receipt of money and of respondent's state of mind in soliciting and receiving the payments, both of which may be proved without violation of the Clause. While the evidence in question may incidentally refer to or by its nature suggest that respondent performed specific legislative

acts, its value to the prosecution is entirely independent of any legislative acts that respondent may in fact have performed.[24] The task of the Court in this case is to determine whether such incidental references to legislative acts offend the constitutional privilege.

The passages from the Court's opinion in *Brewster* on which respondent relies were written in answer to Mr. Justice White's assertion (408 U.S. at 553-555) that the majority's decision could not be reconciled with the holding in *Johnson*. The Court replied by reaffirming that "*Johnson* precludes any showing of how [a defendant Congressman] acted, voted, or decided" and that "evidence of acts protected by the [Speech or Debate] Clause is inadmissible" (*id.* at 527, 528). The meaning of these statements can only be understood by reference to *Johnson*, the case from which the statements were derived.

Johnson involved a criminal charge that by its nature could not be proved without inquiry into a legislative act and its motivation. The government introduced into evidence the text of a speech delivered on the floor of the House of Representatives; the prosecution also questioned Representative Johnson and others about the reasons for the speech and the method of its preparation. This is what the Court in

[24] The evidence here is thus materially different from evidence directly showing the performance of the legislative act itself, submitted for the purpose of persuading the jury to infer from the fact of performance of the legislative act that the defendant received the money or that he did so with the requisite criminal intent.

Brewster had in mind when it spoke of "evidence of acts protected by the [Speech or Debate] Clause" and a "showing of how [a Congressman] acted, voted, or decided." Those phrases were not intended to encompass testimony of the kind at issue here in connection with a prosecution of the kind at issue here.

The offenses charged in the indictment against respondent are not part of the legislative process. Proof of the elements of those offenses does not require proof of acts that are part of the legislative process. The disputed testimony would relate acts and statements that are not part of the legislative process. The testimony would not be offered for the purpose of showing the performance of a legislative act. Indeed, the truth or falsity of the statements made by respondent and DeFalco outside Congress is immaterial. Whether respondent actually introduced private immigration bills is of no consequence. The important thing is not what respondent did but what he said he did and how his statements and actions reflect his knowledge and intent in receiving payments. The government's witnesses would testify that respondent and DeFalco made statements designed to create the impression that respondent had introduced and would continue to introduce private bills in exchange for money. These statements tend to show the existence of the illegal bribery scheme charged in the indictment, whether or not any legislative acts were in fact performed. Under these circumstances, the Speech or Debate Clause does not

require suppression of the proffered evidence, even though some of the statements made by respondent and DeFalco outside Congress may refer back to private bills that actually were introduced.[25]

The foregoing discussion does not address the admissibility of the documentary evidence produced by respondent before the grand juries. Included among that evidence are copies of the private immigration bills that respondent introduced on behalf of some of his constituents. Also included is correspondence with DeFalco and with the beneficiaries of the private bills. The bills themselves, of course, are legislative acts. The line of argument pursued above would not necessarily support their introduction into evidence, because unlike the proffered testimony, the bills would directly show the performance of a legislative act, they would show nothing but the performance of a legislative act, and they would be relevant only because they would establish that respondent executed

[25] This approach was adopted by the district court in *United States* v. *Garmatz*, 445 F. Supp. 54, 64-65 (D. Md. 1977);

> [D]iscussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of coconspirators which might be casually or incidentally related to legislative affairs.
>
> * * * * *
>
> The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* and *Gravel*, not whether the legislative act in question was performed in the past or in the future.

his part of the illegal bargain. These differences are sufficiently significant to require exclusion of the bills under *Johnson* and *Brewster*, unless respondent effectively waived his Speech or Debate Clause privilege (see pages 106-123, *infra*).[26]

The correspondence poses a more difficult problem, one that can probably be resolved most efficiently by the district court on a letter-by-letter basis in light of guidance provided by this Court's decision. The admissibility of each letter should depend on whether it is a legislative act, within the meaning of that term as used by this Court in the past.[27]

[26] Likewise, respondent's grand jury testimony, in which he describes his introduction of the private bills and his reasons for taking that action, would be admissible in the government's case-in-chief only if respondent waived his Speech or Debate Clause privilege.

[27] An examination of the representative letters reproduced in the special appendix to the government's petition indicate that individual letters may present troublesome problems of classification. For example, the letter in which respondent asks the beneficiaries of a private immigration bill to provide information necessary for consideration of that bill by the appropriate congressional subcommittee (see 78-349 Sp. App. 16-17) may well be a legislative act in the same sense that participation in a committee hearing or an information-gathering investigation is a legislative act. Particularly in view of the private nature of the bills involved, correspondence of this kind conceivably is the only way in which to obtain the information required for the proper functioning of the legislative process. In any event, it is the way chosen by respondent, and that may be sufficient to justify invocation of the Speech or Debate Clause privilege.

By contrast, other letters seem substantially less likely to qualify as "an integral part of the deliberative and communicative processes by which Members participate in House

Letters that are not themselves legislative acts, but that simply refer to legislative acts performed in the past, such as the introduction of private bills, should be admissible for the same reasons that the government's proffered testimonial evidence should be admissible. The government wishes to use the letters not to show the occurrence of any legislative acts, but to show respondent's role in a scheme to introduce private bills in return for payment. The conduct for which respondent was indicted—the taking of a bribe—is not protected by the Speech or Debate Clause, and the letters, if they are not legislative acts, are also not protected by the Clause. In this situation, the constitutional provision does not require that the letters be excluded solely because they refer to the past performance of a legislative act.[28]

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proceedings" (*Gravel* v. *United States, supra,* 408 U.S. at 625). In this group are letters from respondent to his constituents merely informing them of the status of private bills introduced on their behalf (see 78-349 Sp. App. at 21-25), letters from respondent to DeFalco (after he was no longer employed on respondent's staff) reporting on the introduction and progress of private bills (see *id.* at 12, 15), and, especially, letters *from constituents* to respondent providing requested information (see *id.* at 18-20).

[28] With respect to the first question presented in the government's petition, the concern of the Speaker of the House and the Chairman of the House Administration Committee as amici curiae appears to be limited to the private immigration bills themselves and respondent's correspondence with his constituents and DeFalco (see Br. for Amici 47-57). Amici's misgivings are groundless, however, because, as the discussion in the text demonstrates, the government does not contend in this Court that those bills and letters that are legislative acts are admissible even in the absence of a waiver of privilege.

If the Court agrees with this position, the desirable course would be remand to the district court for a determination of the admissibility of each letter under the correct standard. The letters reprinted in the government's special appendix are typical of the correspondence produced by respondent before the grand juries, but there may be individual variations in letters not reproduced that would affect the decision whether they should be classified as legislative acts. No single letter is indispensable to the government's proof on any count of the indictment, and, under these circumstances, considerations of judicial economy suggest that determinations of admissibility be left in the first instance to the district court.

3. *Strong policy considerations support the admission of the testimonial evidence proffered by the government.*

Thus far, our argument has been devoted to showing that the evidentiary ruling under review does not comport either with the history of the Speech or Debate Clause or with the prior decisions of this Court. Perhaps equally important are the strong policy considerations that counsel against expansion of the evidentiary privilege to shield statements or events outside Congress that are not themselves legislative acts but that incidentally refer to or imply the performance of past legislative acts.

a. The language of the Speech or Debate Clause establishes only a limited evidentiary privilege. It provides that a Member of Congress cannot be questioned outside Congress about legislative acts.

This privilege is not at all implicated here. The Constitution does not say in addition that evidence of or evidence referring to legislative acts shall not be admitted in any judicial proceeding. Rather, an evidentiary privilege of that nature is a judicial creation deemed necessary to protect and make meaningful the constitutional immunity from judicial punishment for legislative acts. The core content of the privilege was recognized in *Brewster* and *Johnson*; a dramatically expanded version has been applied by the court of appeals in the present case. Because the privilege is not delineated by the textual commands of the Constitution, this Court has considerable latitude in limning its boundaries. The Court should perform that task, we submit, with due regard for both the need of the criminal justice system to achieve accurate resolution of serious criminal charges and the requirement of the Speech or Debate Clause that Senators and Representatives be immune from liability for legislative acts.

Successful claims of privilege entail significant costs. Probative evidence is removed from the factfinder's consideration and the judicial search for truth is thereby hindered. Assertions of evidentiary privilege should be sustained only when the benefits produced will outweigh the loss to the factfinding process. As Dean Wigmore taught:

> For more than three centuries it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule * * *.

8 *Wigmore on Evidence* § 2192, at 70 (J. McNaughton rev. 1961), quoted in *United States* v. *Bryan*, 339 U.S. 323, 331 (1950).

United States v. *Nixon*, 418 U.S. 683 (1974), is instructive in this regard. The Court there refused to recognize an absolute executive privilege because of the impediment it would "place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions" (*id.* at 707). Although the Court acknowledged a qualified executive privilege protecting the confidentiality of Presidential communications, it ruled that the privilege may at times be forced to yield to the "legitimate needs of the judicial process" (*ibid.*). The Court stressed that evidentiary privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth" (*id.* at 710). Claims of executive privilege, the Court concluded (*id.* at 711-713), must be resolved through a balancing process, weighing the importance of the privilege to the effective performance of official responsibilities against the specific need for relevant evidence in the fair adjudication of a particular criminal case.

In applying the evidentiary privilege derived from the Speech or Debate Clause, courts must evaluate the likelihood that the admission of certain evidence will result in a breach of legislative immunity. Courts must decide, in other words, whether there is any significant possibility that introduction of the disputed evidence will lead to a finding of liability, not on some legitimate basis, but on the basis of conduct protected by the Clause. When there is no such significant possibility, or when any such possibility is outweighed by the need for specific evidence in connection with a prosecution for nonlegislative acts, the judicial interest in accurate and reliable factfinding should prevail, and relevant evidence should be admitted, even if it does contain a reference to a past legislative act. The breadth of the privilege depends ultimately on the claimant's ability to demonstrate that particular kinds of evidence should be excluded in order to preserve legislative independence. When the values underlying the Speech or Debate Clause are not threatened, there is no need to reject probative evidence in deference to a legislative privilege.

James Madison recognized this point nearly 150 years ago, in a letter commenting on a speech by Philip Doddridge regarding the congressional privilege. Madison wrote: "In the application of this privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide." 4 J. Madison, *Letters and Other Writings* 221 (1865).

The thought was echoed by the opinion in *Brewster*, where the Court declared that the legislative privilege "does not extend beyond what is necessary to preserve the integrity of the legislative process." 408 U.S. at 517.

Admission of the government's testimonial evidence in the present case would not jeopardize congressional independence. It strains credulity to suppose that any Senator or Representative would be inhibited in the diligent performance of his duties by a fear that conversations outside Congress referring to his legislative acts could be admitted against him in a prosecution for bribery. Thus reduced to its essentials, respondent's position reveals its inherent implausibility. The suppression of evidence ordered by the district court and endorsed by the court of appeals simply would not promote the goals of the Speech or Debate Clause. See *United States* v. *Brewster*, *supra*, 408 U.S. at 524-525.

b. Suppression under the sweeping standards adopted by the courts below would, however, have the predictable result of making bribery prosecutions of Congressmen nearly impossible, except in situations where an exchange of funds takes place prior to the performance of any legislative act[29] or in the rare case in which a legislator's agreement to receive a

[29] Even in such cases the prosecution would, in practice, often be crippled by an inability to show corrupt knowledge and intent through evidence of nonlegislative acts and statements transpiring after the performance of some legislative act.

bribe can be proved solely on the basis of statements and events that do not refer to any completed legislative act and that afford no basis for inferring the performance of such an act. Such a development would hardly contribute to legislative integrity. Moreover, it would force Congress to shoulder the entire burden of policing the activities of its Members in cases where bribes or gratuities may have been paid for past legislative acts. It would do so notwithstanding the clearly expressed legislative policy, reflected in Section 201, to commit such cases to judicial resolution.

Despite the representations of amici concerning the internal disciplinary capabilities of the House and Senate (Amici Br. 16-27), this Court's observation in *Brewster* remains sound: "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." 408 U.S. at 518. Unlike Parliament, Congress is not and never has been a court or judicial body. Ethical standards established by Congress for its Members do not define prohibited conduct with the same detail and specificity found in the federal criminal code.

Not only do the governing behavioral standards invest Congress with an even greater degree of prosecutorial discretion than is exercised by the United States Attorneys, but the procedural protections afforded to Members involved in congressional disciplinary proceedings are not nearly as well developed as those enjoyed by defendants in criminal

trials. Most notably, a single House of Congress must serve simultaneously as "accuser, prosecutor, judge, and jury * * *." 408 U.S. at 519. Furthermore, the intrusion of political motives into the disciplinary process is an ever-present danger. As the Court said in *Brewster* (*id.* at 519-520), "it would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment."

By undertaking disciplinary measures against its own Members, Congress unavoidably would divert its attention from the lawmaking activities that are its primary function. In addition, it is not clear that congressional jurisdiction is adequate to the task. In a case like the present one, Congress might well be unable to reach and punish misconduct performed by a legislator while a Member of the House or Senate but not discovered or fully investigated until after he has left office. And a substantial question may exist about the ability of a particular Congress to impose sanctions that extend beyond the life of that Congress. See *United States* v. *Bryan*, 339 U.S. 323, 327 (1950).

c. Respondent's argument in support of the district court's suppression of probative evidence only incidentally referring to legislative acts appears to rest on the assumption that admission of the government's proffered testimony would open the door to dangerous executive abuses of the prosecutorial function and direct interference by the Executive Branch in the legislative process. This Court fully answered

such concerns in *Brewster*. In the first place, the history of this Nation "does not reflect a catalogue of abuses at the hands of the Executive" similar to that which gave rise to the English antecedents of the Speech or Debate Clause. 408 U.S. at 508. More important, the potential for abuse feared by respondent is "inherent in a system of government that delegates to each of the three branches separate and independent powers." *Id.* at 522. This is the point of the "check and balance mechanism" established by the Framers (*id.* at 523).

As the Court stated in *Brewster* (*id.* at 522-523 n. 16), "[t]he Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." Completely apart from its power of the purse, Congress has within its exclusive control perhaps the most obvious remedy for a perceived threat of harassment from unwarranted bribery prosecutions. By statutory amendment, the Legislative Branch can simply exempt its Members from the reach of the federal bribery laws. See *id.* at 524. It can also enact a rule of evidence barring admission of testimony of the kind at issue in this case. In light of these available safeguards and the lack of historical evidence of abuse in this country, the evidentiary privilege derived from the Speech or Debate Clause need not and should not be given the sweeping scope urged by respondent. Admission of the government's proffered testimony in this case will materially advance a legitimate criminal prosecution

without jeopardizing legislative independence and integrity.

Finally, one policy consideration offered in support of the court of appeals' decision merits a brief response. The court of appeals stated (78-349 Pet. App. 29a) that admission of the government's testimonial evidence "would discourage the dissemination to the public of information about legislative activities." It will have no such effect. It is incredible to assume that Senators and Representatives will voluntarily curtail their efforts to publicize their achievements in Congress solely in order to prevent the finder of fact in some subsequent criminal trial from learning of specific legislative acts. Such precautionary measures would be contrary to prior experience with congressional behavior and contrary to the Members' own interest in informing their constituents of their legislative accomplishments. Fortunately, the vast majority of Senators and Representatives confront little if any prospect of criminal prosecution. Receipt into evidence of respondent's conversations outside Congress referring incidentally to his introduction of private bills could not possibly prompt Members of Congress to restrict the distribution of information concerning their legislative activity.

This Court implicitly recognized as much in *Gravel* v. *United States*, *supra*, and *Doe* v. *McMillan*, *supra*. In *Gravel*, the Court held that the Speech or Debate Clause does not foreclose inquiry into the private publication of the record of a congressional com-

mittee hearing. In *Doe*, the Court approved inquiry into the distribution of official congressional committee reports outside Congress, even though petitioners' suit inevitably focused not only on the fact that a report was issued but also on the contents of the report. These decisions simply reinforce the conviction that, in the context of an effort to impose civil or criminal liability for nonlegislative acts, other nonlegislative acts should be admissible in evidence, even if they contain references to the past performance of conduct protected by the Speech or Debate Clause.

B. When a Member of Congress is prosecuted for receiving a bribe, in violation of 18 U.S.C. 201, evidence referring to legislative acts is admissible, because Section 201 is "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members."

The second theory on which introduction of the government's proffered evidence can be sustained is derived from *United States* v. *Johnson*, *supra*, 383 U.S. at 185. The Court there expressly reserved for future consideration the validity *vel non* of

> a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

The bribery provision in the federal criminal code, 18 U.S.C. 201, applies in terms to Members of Con-

gress [30] and qualifies as a "narrowly drawn statute" within the meaning of the Court's opinion in *Johnson*. Congress has the constitutional power to commit to the Executive and Judicial Branches the investigation, trial, and punishment of offenses related to the legislative process. Section 201 represents an exercise of that power. Accordingly, assuming *arguendo* that the government's proffered evidence in this case would otherwise be inadmissible under the Speech or Debate Clause, introduction of that evidence is nonetheless acceptable here, because it is offered to prove an offense under Section 201, a narrowly drawn statute specifically applicable to Members of Congress.

Article I, Section 5 of the Constitution empowers Congress to punish its own Members.[31] *Powell* v. *McCormack*, *supra*, 395 U.S. at 548; *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189-190. In an appropriate case such punishment may even include imprisonment. *Ibid.* This power of the Legislative Branch to discipline its own Members was recognized in England and the colonies well before the adoption of the American Constitution. See pages 39-40 *supra*; Brief for the United States in *Brewster* (No.

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[30] Section 201(c) prohibits public officials from soliciting or receiving anything of value in return for being influenced in the performance of an official act. Section 201(a) defines "public official" to include Members of Congress.

[31] Clause 2 of Section 5 provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two thirds, expel a Member."

70-45, 1971 Term) 12-19. Indeed, members of the colonial legislatures were frequently punished by censure, admonition, fine, or imprisonment, either for unexcused absences from the house or for violating specific rules governing legislative proceedings or more general regulations dealing with members' conduct. M. Clarke, *Parliamentary Privilege in the American Colonies* 73-74, 177, 181-182, 184 (1971). In addition, as amici observe (Amici Br. 15), there have been several instances in which the Senate or House of Representatives has disciplined one or more of its Members, either for legislative misconduct or for behavior outside Congress detrimental to the integrity of the Legislative Branch. See McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude and to Punish*, 41 Fordham L. Rev. 43, 65-66 (1972).

Congress may enlist the aid of the Executive Branch and the courts in exercising its Article I power to discipline its Members. Under the general legislative power provided in Article I, Section 1 and under the Necessary and Proper Clause in Article I, Section 8, Congress may enact laws providing for the criminal punishment of misconduct by its Members. This Court has sustained the constitutionality of criminal prosecutions under such a statute. *Burton* v. *United States*, 202 U.S. 344, 365-370 (1906).[32] See also

[32] *Burton* affirmed the conviction of a United States Senator for taking money in return for his efforts before the Post Office Department on behalf of a grain and securities company under investigation by the Postmaster General for possible mail fraud. The Senator's conduct violated Rev. Stat. 1782, 13 Stat. 123, a predecessor of the current conflict-of-interest statute, 18 U.S.C. 203.

United States v. *Johnson*, 419 F.2d 56 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); *May* v. *United States*, 175 F.2d 994 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949). Although Congress itself could impose sanctions against its Members for the conduct proscribed by these statutes, it has chosen to share its power with the Executive and Judicial Branches by explicitly making criminal certain official misconduct.[33] In addition, of course, Congress has not chosen to exempt its Members from the operation of the general provisions of the federal criminal code and thus relies on the courts and the executive to deal with possible criminal behavior outside a Congressman's official capacity.

The question reserved in *Johnson* is whether the Speech or Debate Clause precludes Congress from delegating its authority to punish its own Members, where proof of the offense charged would entail inquiry into legislative acts or motivations. We have argued above that proof of the first four counts in respondent's indictment would not entail any such inquiry, and we of course adhere to that position. But

[33] Analogously, Congress has enacted legislation making a witness's refusal to answer questions before Congress or a congressional committee a misdemeanor punishable by a court. See 2 U.S.C. 192. Congress has taken this step even though it could itself punish such refusals as contempt. This Court has upheld the constitutionality of Congress's decision to share its power with the other two Branches. *In re Chapman*, 166 U.S. 661, 671-672 (1897); *Jurney* v. *MacCracken*, *supra*, 294 U.S. at 151-152. See also *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189-190.

even if respondent's bribery prosecution would involve some examination of his legislative conduct, Congress has the power to authorize such an inquiry and has done so in 18 U.S.C. 201.

The purpose of the Speech or Debate Clause is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States* v. *Brewster*, *supra*, 408 U.S. at 507. By enacting Section 201 and earlier versions of the same statute, Congress has demonstrated its belief that bribery prosecutions of Senators or Representatives will not detract from the independence of the Legislative Branch or harm the integrity of the lawmaking process. Although the legislative history of the federal bribery provisions is not extensive, it suggests that Congress thought the statutes would have precisely the opposite effect, *i.e.*, they would protect Congressmen from legislative trials apt to be influenced by political factors and at the same time would promote public confidence in the integrity of a Legislative Branch that had displayed a willingness to allow its own Members to be tried in an impartial forum over which it has no control.

The original precursor of Section 201 was enacted in 1853. 10 Stat. 170, 171. The debate in the House of Representatives shows Congress's desire to pass a bill that would set clear standards of conduct and sharply reduce the role of political considerations in the handling of official misconduct. Representative Stephens declared (Cong. Globe, 32d Cong., 2d Sess. 291 (1853)):

> I am for establishing a rule by which every one can regulate his conduct, and then right and wrong will not be left to the capricious judgment of friend or foe. Let it be written in the law, and then all can equally stand or fall by the law, and not the uncertain standard of men's opinions.

The Speech or Debate Clause was not mentioned during the debate, and there was no suggestion that prosecutions under the proposed statute might undercut the protections afforded by the Clause.

More than 100 years later, when Congress comprehensively revised the federal bribery and conflict-of-interest laws in 1962, there was again no indication that Congress feared enforcement of Section 201 might infringe on legislative prerogatives protected by the Speech or Debate Clause. See H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961); S. Rep. No. 2213, 87th Cong., 2nd Sess. (1962); *Conflicts of Interest: Hearings Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962). Rather there appears to have been general agreement that the existing provisions relating to Members of Congress should be continued in effect.

Without evidence of the kind proffered by the government in this case, the task of proving that a Member of Congress received a bribe in return for being influenced in the performance of a legislative act would be exceedingly difficult, if not impossible. It is implausible to assume that for 125 years Congress has provided the statutory authority for bribery pros-

ecutions of its Members but at the same time has recognized that much conduct clearly covered by the statutory proscription cannot be successfully prosecuted because the Speech or Debate Clause bars the introduction of critical evidence. Unless one is willing to make such an unlikely assumption, only two other conclusions can be drawn from the Legislative Branch's longstanding acceptance of criminal bribery laws applicable to its Members. Either Congress believes that enforcement of those laws will not violate the Speech or Debate Clause because it will not entail inquiry into legislative acts (in which case the government's proffered evidence is inadmissible under the first theory, discussed above), or Congress believes that it has the power to authorize such inquiry, notwithstanding the Speech or Debate Clause (in which case the government's evidence is admissible under the second approach, treated here). In either event, Congress's legislatively expressed views on the proper interpretation of the relevant constitutional provisions are entitled to substantial weight.[34]

[34] The brief filed in the present case by the Speaker of the House and the Chairman of the House Administration Committee as amici curiae may diverge in some respects from the position Congress as a whole has endorsed since 1853 through its continued tolerance for and periodic reenactment of federal bribery statutes applicable to Senators and Representatives. The precise nature of amici's position is difficult to ascertain (see Br. 27-40, 63) but to the extent their arguments may differ from the congressional views reflected in enacted legislation, the considered judgment of Congress as an institution performing its lawmaking function must take precedence.

As this Court stated in *United States* v. *Nixon*, *supra*, 418 U.S. at 703, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."

Assuming for the sake of argument that the evidence offered in this and other prosecutions under Section 201 does entail inquiry into legislative acts, there is still ample reason to conclude that the Speech or Debate Clause does not bar congressional delegation of authority to punish Senators and Representatives. The policy considerations already canvassed (see pages 67-76, *supra*) are equally applicable here. Congress is ill-suited to conduct criminal trials, and the standards by which it would judge its Members' behavior are far less definite than those provided in Section 201. Moreover, an increase in the number of congressional disciplinary proceedings could only impair the ability of the Legislative Branch to perform its lawmaking function. Reliance on the federal judicial system for the fair disposition of bribery accusations against Senators and Representatives serves the dual purpose of relieving the burden on Congress and protecting individual legislators from the danger of politically motivated penalties. In short, if Congress has the power, as respondent and the courts below concede it does, to punish its Members for taking bribes, and if Congress chooses, on a limited basis, to enlist the executive and the courts as partners in the exercise of that power, the inde-

pendence of the Legislative Branch is not threatened and there is no violation of the Speech or Debate Clause.[35]

[35] There may be an appearance of inconsistency between the position advocated here and the discussion of waiver in Part III, *infra*, but closer examination shows that any disparity is at most superficial. We argue in Part III that an individual Senator or Representative who wishes to waive his evidentiary privilege under the Speech or Debate Clause may do so. We argue here that Congress as an institution, in the exercise of its power to punish under Article I, Section 5, may authorize inquiry into the legislative acts of its Members, even without the consent of the individual Members whose conduct is questioned. Some authorities would apparently agree with the first proposition but not the second. See, *e.g.*, *United States* v. *Brewster*, *supra*, 408 U.S. at 547 (Brennan, J., dissenting) ("a personalized legislative privilege not subject to defeasance even by a specific congressional delegation to the courts"); *Coffin* v. *Coffin*, *supra*, 4 Mass. at 27 (interpreting a state constitutional provision to confer a privilege to which each member is entitled, "even against the declared will of the house"). These views stress the personal nature of the legislative privilege, but do not take adequate account of the underlying purpose of the Speech or Debate Clause.

The Clause does confer an immunity and a privilege on individual legislators, but it does so only because the Framers regarded such a measure as a necessary instrument for the achievement of a higher goal, namely, the protection of the independence and integrity of the Legislative Branch. As this Court said in *Brewster* (408 U.S at 507):

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.

We contend in Part III that if a particular Senator or Representative concludes that his freedom and sense of personal security will not be impaired by a waiver of his constitutional

If the foregoing argument is correct, the only question that remains is whether 18 U.S.C. 201 is a "narrowly drawn statute" within the contemplation of this Court's reservation in *Johnson*. We submit that it is.

The meaning of the phrase "narrowly drawn statute," as the Court used it in *Johnson*, can only be understood by reference to the conviction there under review. Representative Johnson was convicted of violating 18 U.S.C. 371, the general federal conspiracy statute. Because of that statute's broad applicability to all agreements to defraud the United States, the Court could not know whether Congress contemplated that it should cover the conduct of a

protections, there is no reason to believe the Speech or Debate Clause will be offended by such a waiver. The purpose of the Clause is fully served as long as the individual legislator knows the privilege is available if he wants to claim it. On the other hand, if Congress as an institution decides to permit inquiry, in certain well-defined circumstances, into its Members' legislative acts, the purpose of the Clause is also served, notwithstanding the possible objections of dissenting legislators. If the Legislative Branch itself determines that a particular kind of inquiry into legislative acts will not adversely affect congressional independence, the policies of the Clause are not in the least offended by deference of the other branches of government to that judgment. This is all the more true because, if experience reveals the legislative judgment to have been faulty, Congress retains the ability to correct its mistake. There is thus no inconsistency in the position that an individual Congressman can waive his own privilege and Congress as a body can waive the privilege of its Members. Both aspects of the argument are faithful to the rationale of the Speech or Debate Clause.

Senator or Representative in connection with the delivery of a speech on the floor of either House.

No such uncertainty surrounds Section 201, however. The specific wording of that statute eliminates all doubt that Congress intended to provide for the punishment of Members who solicit or receive bribes. The definition of "public official" in Section 201(a) explicitly includes Members of Congress, and the statutory description of the "official acts" that may be subject to improper influence unquestionably encompasses the introduction of proposed legislation by Senators or Representatives.

Appellee in *Brewster* argued that, despite its clear applicability to Members of Congress, Section 201 is not a "narrowly drawn statute" within the meaning of *Johnson*. Br. for Appellee (No. 70-45, 1971 Term) 72-83. Senator Brewster contended that *Johnson* used the phrase "narrowly drawn statute" in the same way the Court used it in First Amendment overbreadth cases (see, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940); *Elfbrandt* v. *Russell*, 384 U.S. 11, 18-19 (1966); *Ashton* v. *Kentucky*, 384 U.S. 195, 200-201 (1966); *Whitehill* v. *Elkins*, 389 U.S. 54, 62 (1967)), and that Section 201 is not "narrowly drawn" because its description of prohibited conduct is too sweeping. Brewster maintained that, because Section 201's definition of bribery is "lacking in specificity" and susceptible to a broad interpretation, the statute could have a chilling effect on legislative conduct. There are several responses to this argument.

If the concern is that the precise boundaries of Section 201 are not easily ascertainable, the simple answer is that this is not a case near the outer limits. Section 201 does permit the imposition of punishment for an unconsummated agreement to receive a bribe or gratuity in return for a legislative act, but two of the three substantive counts in the present indictment charge that respondent actually received his bribes, and the third substantive count charges a solicitation and illegal agreement that is directly related to the criminal scheme described in the rest of the indictment. Whatever may be the appropriate disposition in a case where it is not clear that a Congressman's conduct is prohibited by Section 201, any uncertainty about the provision's reach is insignificant here, where the alleged offenses fall squarely within the statute's compass.

If the concern is that the necessity for a determination of criminal intent under Section 201 reposes too much discretion in the hand of the jury, the answer is plainly that the jury is always charged with the responsibility of deciding whether a particular defendant has the requisite criminal intent in connection with a potentially illegal agreement. The rule should be no different when the defendant is a Congressman, instead of another public official or a private citizen. Unless the phrase "narrowly drawn statute," as used in *Johnson*, can never include a statute that punishes inchoate crimes for which a jury determination of intent is critical, Section 201 should not fail the "narrowness" test on this ground.

Finally, if the concern is that the breadth of Section 201 may cause Senators and Representatives to adjust their conduct in undesirable ways in order to avoid the possibility of running afoul of the bribery law, the answer is that Congress itself can eliminate any perceived restrictions on legitimate legislative behavior by the simple expedient of amending the statute. Unlike the situation in the First Amendment cases cited by appellee in *Brewster*, here the putative "victims" of an overbroad criminal statute are the very persons who have it within their immediate power to change that statute. The persons regulated are the very ones doing the regulating. In these circumstances, the possibility that the longstanding federal bribery provisions will have an improper "chilling effect" on Members of Congress is insubstantial and does not remove Section 201 from the category of "narrowly drawn statutes," as that phrase was used in *Johnson*.

II.

BREWSTER ESTABLISHES THE CONSTITUTIONALITY OF THE FIRST FOUR COUNTS IN RESPONDENT'S INDICTMENT, AND THE COURT OF APPEALS PROPERLY REFUSED TO ISSUE A WRIT OF MANDAMUS BARRING RESPONDENT'S TRIAL ON THOSE COUNTS

Much of what has been said in Part I is, of course, relevant to the validity of the first four counts of respondent's indictment. Unlike the question already discussed, however, the three questions presented in respondent's petition (No. 78-546) all involve matters of settled law. That is why we deemed it advis-

able to depart from chronological organization and address first the substantial open question concerning the kinds of evidence that may be used to prove criminal charges like those sustained in *United States* v. *Brewster, supra*. Respondent's attack on his indictment is foreclosed by the decision in *Brewster*, and he is in any event not entitled to the extraordinary remedy he sought from the court of appeals. The current procedural posture of respondent's case only reinforces the independent conclusion that relief should be denied because the challenge to the indictment is without merit.

A. Apart From the Merits of Respondent's Arguments, This is Not an Appropriate Case for Mandamus.

This Court has repeatedly held that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations" and only when "the party seeking issuance of the writ ha[s] no other adequate means to attain the relief he desires * * *." *Kerr* v. *United States District Court*, 426 U.S. 394, 402, 403 (1976). See also *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662 (1978) (plurality opinion); *Will* v. *United States*, 389 U.S. 90, 95-98 (1967); *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383 (1953). In particular, the Court has said that "[o]rdinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record." *Roche* v. *Evapo-*

rated Milk Ass'n, 319 U.S. 21, 27-28 (1943). Moreover, the decisions establish that "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr* v. *United States District Court, supra*, 426 U.S. at 403.

Applying these standards, the court of appeals properly refused to grant the relief sought by respondent (78-349 Pet. App. 9a-21a). Respondent can present his Speech or Debate Clause claims to the court of appeals on review of a final judgment of conviction, if such a judgment is ever entered in the district court. At that time he will have a full opportunity to challenge the district court's denial of his motion to dismiss the indictment. In the meanwhile, respondent may be acquitted at trial and thereby render further appellate review unnecessary. Mandamus at the present stage is an undesirable form of review because it ignores this Court's frequently stated policy against interlocutory consideration of pretrial orders in criminal cases. *United States* v. *MacDonald*, 435 U.S. 850, 853 (1978); *DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323 (1940).

Respondent insists (Br. 37-38), however, that the very fact of a trial on the first four counts of the indictment, regardless of its outcome, would violate the Speech or Debate Clause. He observes that the Clause is intended to protect Senators and Representatives from the burden of defending themselves against improper criminal charges and civil suits, as well as from the imposition of liability on the

basis of legislative acts. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975); *Powell* v. *McCormack, supra*, 395 U.S. at 505; *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). In this respect, he asserts, the Speech or Debate Clause is analogous to the Double Jeopardy Clause; the effect of both is to prevent not only the imposition of criminal sanctions, but also the distraction and expense of a trial. Accordingly, respondent contends, the denial of a motion to dismiss on Speech or Debate Clause grounds should be appealable before trial, just as the denial of a motion for similar relief on Double Jeopardy grounds is appealable before trial under this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977).

The short answer to this contention is that, if it is correct, respondent should have filed a timely appeal, not a petition for a writ of mandamus more than three months after the district court's decision and well after the time for appeal had expired. See Fed. R. App. P. 4(b). Respondent attempts to excuse his delay (Br. 56) on the ground that this Court only decided *Abney* in June 1977 and that his petition for a writ of mandamus was filed in the court of appeals one week later. This suggests that respondent believes the Court's ruling in *Abney* changed the law in the Third Circuit and indicated he was entitled to immediate appellate review at a stage where such review was previously unavailable. This is not so.

Abney involved review of an unpublished decision of the Third Circuit itself, in which that court entertained an appeal and rejected on the merits a challenge to a pretrial order denying a motion to dismiss on Double Jeopardy grounds. See 431 U.S. at 655-656; 530 F.2d 963 (3d Cir. 1976). More important, the law of the circuit had been clearly stated and explained in a published opinion issued two years before *Abney*. *United States* v. *DiSilvio*, 520 F.2d 247, 248 n.2a (3d Cir.), cert. denied, 423 U.S. 1015 (1975). And, as this Court's opinion in *Abney* indicated (431 U.S. at 657), the view endorsed there had already been adopted by the majority of the courts of appeals that had considered the issue by the end of 1976. Thus, if respondent's analogy to the Double Jeopardy Clause is apt, he could have filed a prompt notice of appeal in February 1977 and obtained the immediate review to which he claims to be entitled. He should not now be permitted to use a petition for a writ of mandamus to cure his failure to pursue a timely appeal.[36] In any event, even if the court of appeals could properly take cognizance of

[36] If respondent had erred only by mislabelling his request for relief a petition for mandamus rather than an appeal, full review by the court of appeals at this stage might be appropriate. Respondent also failed, however, to present his claims within the jurisdictional time limit for appellate review. Accordingly, interlocutory review in this case is improper. Particularly since he no longer sits in Congress and his trial will not deprive his constituents of legislative representation for any period, there is little harm in remitting him to his right to appeal any adverse final judgment that may be entered against him.

respondent's request for mandamus relief, that request is without merit for the reasons set forth below.

B. References in the Indictment to Specific Legislative Acts Do Not Render the Charges Against Respondent Invalid.

Notwithstanding respondent's assertions to the contrary (Br. 21-22, 35-43), the indictment in the present case is not materially distinguishable from the indictment sustained in *United States* v. *Brewster*, *supra*. See 78-349 Pet. App. 13a-15a. The *Brewster* indictment charged a Senator with four counts of receiving bribes in return for being influenced in the performance of legislative acts, in violation of 18 U.S.C. 201(c), and one count of receiving a gratuity for and because of the past performance of legislative acts, in violation of 18 U.S.C. 201(g). The indictment specified that the legislative acts to which it referred were Senator Brewster's " 'action, vote, and decision on postage rate legislation' " that might be or had been pending before him in his official capacity. The Section 201(g) count left no doubt that Brewster was charged with receiving a gratuity for completed legislative acts, *i.e.*, a vote and action on legislation that had been pending before him in an earlier session of Congress. See 408 U.S. at 527.

The first four counts of the indictment in the present case (78-546 Pet. App. 1a-6a) charge that respondent solicited and received money, and con-

spired to solicit and receive money,[37] in return for "being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives." The conspiracy count alleges 16 overt acts (*id.* at 2a-4a). Three of these (Nos. 11, 13, and 16) are the introduction of private bills for named individuals on specified dates. A fourth alleged overt act (No. 2) is the introduction of private bills for the clients of a named attorney during a nine-month period. The three substantive bribery counts are based on respondent's alleged solicitation and receipt of money in return for being influenced to introduce private bills for the individuals named in Overt Acts 11, 13, and 16. The substantive counts repeat the allegation in the conspiracy count that respondent did in fact introduce such bills on specified dates (*id.* at 5a, 6a).

Respondent now contends that the indictment is fatally defective because it mentions particular legislative acts. He argues that the indictment in *Brewster* survived scrutiny under the Speech or Debate Clause because it refrained from describing the defendant's "action, vote, and decision on postage rate legislation." The indictment here, by contrast, alleges that respondent introduced private bills for

[37] The final sentence of the conspiracy count in the indictment has been omitted in the reprinting of that count in the appendix to respondent's petition (78-546 Pet. App. 1a-4a). The sentence reads: "All in violation of Title 18, United States Code, Section 371" (C.A. App. 12).

named individuals on specified dates. This, in respondent's view, is impermissible.

Respondent's argument wholly misses the point of the decision in *Brewster*. His misunderstanding is revealed in his repeated inaccurate assertions that "the indictment in this case charges legislative acts" (Br. 36; see also Br. 21-22, 34-35, 36-38, 40-41). The indictment here, like the indictment in *Brewster*, charges the solicitation and receipt of bribes intended to influence the performance of legislative acts. The actual performance of those acts is no part of the offenses charged here, just as it was no part of the offenses charged in *Brewster*. The critical feature of the indictment in *Brewster*, the Court held, was that proof of the material elements of the offenses charged did not require proof of a Congressman's legislative conduct. The Section 201(g) count in *Brewster* plainly charged that the defendant received money for a past legislative act, but the Court ruled that the indictment's reference to a completed act was unobjectionable because inquiry into the legislative performance was not necessary to establish the offense charged. In the Court's words (408 U.S. at 527), "[a]lthough the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation."

Respondent has been indicted for violating the *same statutory provision* that was the basis for four of the five counts against Senator Brewster. The material elements of an offense under Section 201(c)

have not changed since 1972; proof of the offense still does not require proof of any legislative acts. Respondent is simply wrong when he asserts (Br. 41) that in order to prove the charges against him, the government must prove the performance of the legislative acts mentioned in the indictment. Even if the allegations that respondent actually introduced private bills are shown to be false, it would in no sense be fatal to the government's case. To obtain a conviction the government must show that respondent received or agreed to receive money, with the knowledge that it was being paid for the purpose of influencing him in the performance of an official act. No proof of actual performance is required. As the court of appeals correctly concluded (78-349 Pet. App. 15a), "to establish a prima facie case, the government need not show any of the legislative acts for which [respondent] allegedly accepted payments." The first four counts of the indictment therefore do not threaten to impose criminal liability on the basis of legislative acts, and they do not violate the Speech or Debate Clause.[38]

[38] If the Court rejects this argument and agrees with respondent that the indictment should omit mention of particular legislative acts, the appropriate remedy would be not dismissal but redaction along the lines proposed by the district court in its oral ruling on February 1, 1977 (C.A. App. 241-253; see page 8, *supra*). Because proof of respondent's introduction of private immigration bills is not necessary to establish his guilt, the references to specific legislative acts can be stricken from the indictment without difficulty. See *United States* v. *Dowdy*, 479 F.2d 213, 224 (4th Cir.), cert. denied, 414 U.S. 823 (1973). Respondent's performance of a legislative act is not an element of any of the offenses charged, nor must the introduction of particular private bills be mentioned in the indictment in order to describe the way in which one or more elements of an offense were accomplished. The specification of legislative acts is mere surplusage and may be deleted if necessary without denying respondent his Fifth Amendment right to indictment by a grand jury. See *Ford* v. *United States*, 273 U.S. 593, 602 (1927); *United States* v. *Hall*, 536 F.2d 313, 319 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *McCrane*, 527 F.2d 906, 912-913 (3d Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Dawson*, 516 F.2d 796, 800-804 (9th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Cirami*, 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964 (1975).

C. The Grand Jury's Consideration of Respondent's Legislative Acts Does Not Render the Indictment Invalid.

Respondent contends (Br. 22-24, 49-55) that the first four counts of the indictment must be dismissed because he was questioned before the grand jury concerning his legislative acts and because the grand jury subsequently considered evidence of those acts before deciding to return the indictment for bribery. The district court (78-349 Pet. App. 42a-43a) and the court of appeals (*id.* at 17a-21a) disposed of this argument with little difficulty, and it does not warrant extended discussion here. The Speech or Debate Clause does not forbid the government from inviting a Senator or Representative to testify before a grand jury investigating alleged corruption in connection with certain legislative activity. Nor does the Clause require dismissal of an indictment returned by a grand jury that has considered evidence of a Congressman's legislative acts.

In the first place, the underlying premise of respondent's argument is open to serious question. Since a grand jury proceeding is not an adversarial proceeding to which potential targets are parties, a grand jury inquiry into the legislative acts of a Member of Congress arguably does not entail "questioning" him in violation of the Speech or Debate Clause. Although a Senator or Representative himself cannot be compelled to testify about his conduct in Congress, that does not necessarily imply that a grand jury may not consider evidence of his legislative activity from other sources, such as the testimony of third parties.[39] Of course, a Congressman may not be indicted for legislative acts, and his trial may not involve "questioning" of such acts. But as long as neither of these possibilities occurs and as long as the Congressman himself is not forced to submit to grand jury questioning, the grand jury may well be able to review evidence of legislative acts without offending the Speech or Debate Clause.

Even if this view is flawed, however, and a Member of Congress may assert his privilege to bar the presentation of legislative act evidence to the grand jury, it does not follow that he may attack an indictment on the ground that it is based on evidence

[39] By analogy, if the legislative acts of a Member of Congress were relevant in a civil suit between private parties, the Speech or Debate Clause would not bar judicial consideration of those acts, as long as the necessary evidence could be obtained without questioning the Member himself.

protected by the Speech or Debate Clause.[40] Under this Court's decisions (see pages 100-102, *infra*), if the indictment is valid on its face and has been returned by a competent grand jury, it is sufficient to call for a trial.

Respondent suggests (Br. 49-50) that the United States Attorney violated the Speech or Debate Clause simply by asking him to appear before the grand jury. The suggestion is groundless. When respondent received the request to testify concerning his legislative acts, he was free to refuse and assert his Speech or Debate privilege. He was told repeatedly that he was not obliged to answer questions. He nonetheless chose to testify and cooperate further with the grand jury by producing files of documents regarding the private immigation bills he introduced. He cannot

[40] If a Senator or Representative were free to challenge an indictment on the ground proposed by respondent, virtually every indictment returned against a Member of Congress would prompt a pretrial inquiry into whether the grand jury heard any evidence of legislative acts and, if it did, whether the amount of that evidence and its likely impact on the grand jury's deliberations were sufficient to warrant dismissal of the indictment. This is precisely the kind of pretrial proceeding that the Court's previous decisions have consistently sought to avoid. As the Court stated in *Costello* v. *United States*, 350 U.S. 359, 363 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.

complain now that his own tactical decision in response to the United States Attorney's invitation was barred by the Speech or Debate Clause.

Respondent contends (Br. 49-50, 54), however, that his grand jury testimony was not the product of his free will, because he believed that the grand jury was investigating "third-party crime" and that therefore he was required to testify, under this Court's decision in *Gravel* v. *United States*, *supra*, 408 U.S. at 628-629. As we explain in more detail in Part III (see pages 119-122 and note 54, *infra*), *Gravel* does not restrict a Congressman's Speech or Debate privilege to those situations in which he himself is the defendant or prospective defendant in a criminal proceeding.[41] But even if respondent is correct and he cannot be held responsible for his involuntary production of evidence before the grand jury, he is not entitled to the relief he seeks. Assuming that either as the result of respondent's appearances or because of testimony by other witnesses, the grand jury improperly considered legislative acts protected by the Speech or Debate Clause, dismissal of the indictment is nevertheless not an appropriate remedy.

Costello v. *United States*, 350 U.S. 359, 363 (1956), held that, "if valid on its face," an indictment that

[41] Respondent attributes (Br. 50 n.27) to the government's brief in *Gravel* the argument that Senators and Representatives are not entitled to claim their Speech or Debate Clause privilege when called to testify about their legislative acts in connection with an investigation of criminal activity by others. Respondent's assertion is false. Neither the government's main brief nor its reply brief in *Gravel* contains any such argument.

charges an offense and that is "returned by a legally constituted and unbiased grand jury * * * is enough to call for trial of the charge on the merits." *Costello* sustained an indictment challenged on the ground that it was based exclusively on impermissible hearsay. See also *Holt* v. *United States*, 218 U.S. 245, 247-248 (1910) (upholding indictment despite allegation that it was based on incompetent evidence). Similarly, in *United States* v. *Calandra*, 414 U.S. 338, 344-345, 349-352 (1974), the Court upheld the grand jury's right to consider and ask questions concerning evidence seized in violation of the Fourth Amendment. The Court stated (*id.* at 344-345) that "the validity of an indictment is not affected by the character of the evidence considered."

Respondent attempts to avoid the effect of *Costello* and *Calandra* by arguing that those cases did not involve a situation in which the grand jury's very consideration of certain evidence violated the Constitution. In *Calandra*, the Fourth Amendment violation occurred long before the grand jury's deliberations, and in *Costello*, the disputed testimony was not the product of any constitutional infringement but merely failed to satisfy a court-developed standard for the admissibility of evidence at trial. By contrast, respondent insists, the grand jury's consideration of his legislative acts was itself a violation of the Speech or Debate Clause, because it involved "questioning" of his conduct in Congress.

This contention fails, however, because it ignores the Court's decisions in *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958), and *United States* v. *Blue*,

384 U.S. 251, 254-255 (1966). Those cases ruled that a grand jury's consideration of evidence obtained in violation of a person's privilege against compulsory self-incrimination will not defeat the validity of a resulting indictment. As the Court repeated in *Calandra, supra*, 414 U.S. at 346, although "the grand jury may not force a witness to answer questions in violation of that constitutional guarantee," "an indictment based on evidence obtained in violation of [the] * * * Fifth Amendment privilege is nevertheless valid."

Similarly here, although the grand jury could not compel respondent to surrender his Speech or Debate Clause privilege and testify concerning his legislative acts, an indictment resulting in part from the grand jury's consideration of respondent's legislative conduct is not subject to attack on the ground that respondent had a right to prevent the grand jury's examination of that evidence. Any possible doubt on the point is eliminated by this Court's decision in *United States* v. *Johnson, supra*, and the subsequent history of that case. The Court permitted a retrial on the conflict-of-interest counts in *Johnson*, even though it was clear from the specification of a legislative act in the original indictment that the grand jury had heard evidence regarding Johnson's congressional speech on the merits of Maryland savings and loan associations. After Johnson's conviction on retrial, the court of appeals rejected the argument that the indictment was invalid because the grand jury had considered evidence of legislative acts. 419

F.2d 56, 58 (4th Cir. 1969). This Court denied certiorari. 397 U.S. 1010 (1970). *Johnson* thus provides strong support for the view that the grand jury's awareness of respondent's practices with respect to the introduction of private immigration bills does not warrant dismissal of the indictment in this case.

D. The Evidentiary Ruling of the Courts Below Does Not Constructively Amend the Indictment.

Respondent argues (Br. 22-23, 43-49) that, by restricting the evidence the government may introduce at trial, the district court and the court of appeals have constructively amended the indictment. As the court of appeals remarked (78-349 Pet. App. 16a), respondent "is not entirely clear on this point." He may be arguing that if the grand jury had not heard evidence referring to his legislative acts, it would not have indicted him, and therefore any conviction resulting from a trial in which that evidence is suppressed cannot stand. This contention is foreclosed by *United States* v. *Calandra, supra*, which holds that a petit jury may return a valid conviction in a trial at which certain evidence is excluded, even if that evidence was the basis for the grand jury's indictment. On the other hand, respondent may be arguing that, by excluding evidence referring to his legislative acts, the courts below have amended the indictment and permitted the petit jury to convict him at trial for offenses not charged by the grand jury. This position is untenable.

Even assuming respondent is correct in thinking that the grand jury would not have voted to indict on the first four counts if it had not known of his introduction of private immigration bills, the evidentiary restriction imposed on the government does not in any way alter the indictment by the grand jury. Our basic position, of course, is that the exclusion of the government's proffered testimony was improper, but if the Court disagrees, there is no reason why the case cannot proceed to trial under the conditions imposed by the district court and the court of appeals. The indictment remains exactly as it was when the grand jury issued it. The elements of the offense that must be proved by the government remain unchanged. The ruling below has simply limited the government's ability to present evidence that might tend to show respondent's performance of a legislative act. And that is a matter of no consequence for respondent's guilt or innocence of the offenses charged. Although the private immigration bills introduced by respondent are mentioned in the indictment, their inclusion is unnecessary and they may be stricken as surplusage without infringing respondent's right to be indicted by a grand jury. See *United States* v. *Brewster*, *supra*, 408 U.S. at 527; see also note 38, *supra*, and cases there cited.

Ex parte Bain, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), on which respondent relies, do not support his position. *Bain* involved an actual amendment of the indictment that struck language that the Court thought might well

have reflected the grand jury's theory of the case. 121 U.S. at 10.[42] In *Stirone*, the indictment was left undisturbed, but the district court charged the jury on a theory of the case that permitted a verdict of guilty for what the Court viewed as an offense different from that charged by the grand jury.[43] Neither situation is comparable to what occurred in the

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[42] Bain was indicted for making a false report in his capacity as a bank cashier, in violation of Rev. Stat. 5209 (1878). An element of the offense was an intent to injure or defraud the bank or an intent to deceive a bank officer or his agent. The indictment charged, *inter alia*, that Bain intended to deceive the Comptroller of the Currency. The district court struck this allegation, and Bain was convicted. Subsequently, this Court granted habeas corpus relief on the ground that Bain might not have been indicted at all, had not an intent to deceive the Comptroller been one possible way of satisfying the intent requirement of Section 5209. Here, by contrast, proof that respondent performed a legislative act could not possibly establish one of the elements of any offense with which he was charged. Barring such proof from admission at trial therefore could not have constructively amended the indictment.

[43] Stirone was charged with unlawfully interfering with interstate commerce by extortion, in violation of 18 U.S.C. 1951. The indictment alleged that he obstructed the movement of sand from outside Pennsylvania into that State. The district court instructed the jury that it could convict the defendant if it found that he had obstructed the movement of steel from Pennsylvania to other states. This Court held the instruction erroneous because it allowed the jury to return a guilty verdict for conduct not charged by the grand jury.

The evidentiary restriction imposed in the present case creates no such problem. In order to convict respondent, the government still must present evidence that proves the offenses stated in the indictment, not some other possible conspiracy or bribery offense involving respondent.

present case. The critical facts that the government must prove remain unchanged here. The court of appeals and the district court have not forbidden the establishment of an element of an offense on a basis previously available, nor have they invited the jury to convict on a theory not charged in the indictment. Accordingly, the evidentiary ruling now at issue did not constructively amend the indictment.

III.

RESPONDENT WAIVED HIS SPEECH OR DEBATE PRIVILEGE WITH RESPECT TO THE USE OF HIS TESTIMONY AND DOCUMENTS BY THE GRAND JURIES INVESTIGATING PRIVATE IMMIGRATION LEGISLATION AND AT TRIAL ON INDICTMENTS ARISING OUT OF THAT INVESTIGATION

A. Background of the Waiver Issue in This Litigation.

Respondent testified on ten separate occasions before eight grand juries investigating alleged corruption in connection with private immigration legislation. On each occasion, the government advised him of his Fifth Amendment privilege against self-incrimination (C.A. App. 693-702, 708, 888, 984-985, 1150-1151, 1283-1284, 1295, 1334-1335, 1455-1456, 1497-1498). Respondent was told that he was under no obligation to answer questions or produce documents if he believed that to do so might incriminate him. He was also told that any testimony he gave or documents he produced could be used against him later in a court of law. Although, in advising respondent of his rights, the government apparently did not mention the Speech or Debate Clause, there is no doubt

that when respondent made his first grand jury appearance he was aware of the Clause and the legislative privilege it confers. The district court so found (78-349 Pet. App. 48a n.4), and respondent has not contested the finding.[44]

At the start of respondent's testimony during his first grand jury appearance, the United States Attorney reminded him of an earlier discussion in which the government had requested production of all of his documentation concerning any private immigration bills that he had introduced in Congress or that he had asked a colleague to introduce (C.A. App. 696-697). The United States Attorney emphasized that respondent was not required to produce the documents and that any documents he did produce could be used against him (*id.* at 697). The United States Attorney also informed respondent of the nature of the grand jury's inquiry (*id.* at 701). Respondent replied (*id.* at 696, 697, 699):

> Whatever I have will be turned over to you with full cooperation of this Grand Jury and with

[44] Respondent could hardly assert in good faith that he did not know of the privilege when he first appeared before the grand jury. During the two years preceding that first appearance, respondent was a party to a civil suit in which his opponent in the 1972 general election challenged his use of the congressional franking privilege. *Schiaffo* v. *Helstoski*, 350 F. Supp. 1076 (D.N.J. 1972), rev'd in part, aff'd in part, and remanded, 492 F.2d 413 (3d Cir. 1974). Respondent argued that the Speech or Debate Clause precludes judicial inquiry into potential abuse of the franking privilege. 492 F.2d at 417. He was represented in the civil proceeding by the same attorney who represented him throughout his grand jury appearances (78-349 Pet. App. 48a n.4).

> yourself, sir. * * * I promise full cooperation with your office, with the FBI, [and] this Grand Jury. * * * I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances.

Subsequently respondent provided the grand jury with the materials now at issue—copies of the private bills he introduced and files of correspondence related to the proposed legislation. He also testified before the grand jury about the congressional procedures for introducing private bills, his reasons for introducing the bills, and his own investigation of allegations that certain Chilean aliens for whom private bills were introduced had paid money to remain in the United States (C.A. App. 829-843, 858-863, 944-962).

As indicated above (see pages 65-67 and note 27, *supra*), some of the letters in the correspondence files produced by respondent probably qualify as legislative acts within this Court's definition of the term. The private bills themselves are clearly legislative acts, and respondent's explanation of his reasons for introducing the bills falls squarely within the area protected by the Speech or Debate Clause. Accordingly, in the absence of a valid waiver of respondent's evidentiary privilege, these materials cannot be used against him in his trial on the bribery charges.

The district court found that "during his various grand jury appearances and in the DeFalco trial [respondent] voluntarily testified in detail regarding his introduction of private immigration bills" (78-

349 Pet. App. 49a). In the court's words, "[t]here can be no question" but that respondent's testimony and production of documents were voluntary. The court also found that, notwithstanding his awareness of the legislative privilege, respondent "[a]t no time * * * asserted any rights under the Speech or Debate Clause" (*ibid.*).[45] The court nevertheless concluded that respondent did not waive his evidentiary privilege. The court distinguished the Speech or Debate Clause privilege first from evidentiary privileges designed to protect confidential relationships and then from the Fifth Amendment privilege against self-incrimination (*id.* at 54a-56a). In view of the purpose of the Speech or Debate Clause "to insulate the independent activities of the legislature from executive and judicial interference" (*id.* at 57a), the court decided that a "stringent" waiver standard should be applied. In the court's view, a valid waiver can be found "only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts" (*id.* at 58a).

The court of appeals agreed and adopted the analysis of the district court (78-349 Pet. App. 29a-32a). The court stated that it would permit a finding of waiver only where a Member of Congress "expressly

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[45] This statement is slightly inaccurate. Respondent did invoke the Speech or Debate Clause in response to one question at his penultimate appearance before the grand jury in May 1976. See page 7, *supra;* C.A. App. 1501-1502.

forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts" (*id.* at 31a).

B. Under Previous Decisions of this Court Involving Waivers of Constitutional Rights, Respondent's Voluntary Testimony and Production of Documents, Together with his Express Disclaimer of Immunity, Were Sufficient to Waive the Speech or Debate Privilege.

Schneckloth v. *Bustamonte*, 412 U.S. 218, 235-237, 241-246 (1973), teaches that the waiver standard applicable to a particular constitutional guarantee depends on the purpose of that guarantee. The case held that knowledge of one's right to refuse a request for permission to conduct a warrantless search is not a prerequisite for "voluntary" consent. *Bustamonte* establishes that "an essentially free and unconstrained choice," as evaluated in "the totality of the circumstances," is ordinarily enough to waive constitutional protections (*id.* at 225-226). The more demanding requirement of a knowing and intelligent waiver has been applied, almost without exception, "only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial" (*id.* at 237).[46] Recently, in *Garner* v. *United States*, 424 U.S. 648, 657 (1976), the Court referred to the "knowing and intelligent waiver" test as an "extraordinary safeguard," applied in custodial

[46] The stricter standard, requiring "an intentional relinquishment or abandonment of a known right or privilege," was articulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (collateral review of the denial of counsel in a federal criminal trial).

interrogation situations only because of the high potential for coercion there involved.

The district court in the present case found that respondent testified and produced documents voluntarily, after being informed that any evidence he provided to the grand jury could be used against him in a subsequent proceeding. The court also found that respondent knew of the Speech or Debate Clause privilege but did not attempt to invoke it. Thus, whether waiver of the privilege must be "knowing and intelligent" or only "voluntary," respondent's performance before the grand jury satisfied the test. Unless there is something unusual about the Speech or Debate Clause that requires adherence to an especially high waiver standard, this Court should hold that respondent effectively waived his legislative privilege with respect to the documents he produced and the testimony he gave before the grand jury.[47]

[47] We contend only that respondent waived his privilege in connection with the grand jury proceedings concerning alleged corruption related to private immigration legislation and the subsequent trial on any indictments arising out of those proceedings. The Court need not decide in this case whether respondent's testimony and production of documents can properly be considered a waiver for other purposes as well. Respondent was advised of the nature of the grand jury investigation (C.A. App. 701), and he knew that the grand juries would consider the evidence he provided in determining whether to return indictments for bribery or related offenses. Under these circumstances, it is fair to say that respondent waived his privilege at least with respect to the grand jury investigation, as the subject matter of that investigation was explained to him, and the use of his evidence at trial on indictments arising out of the grand jury proceedings.

C. An Individual Senator or Representative Can Waive the Speech or Debate Privilege.

In opposing the government's waiver argument, respondent and amici first contend (Resp. Br. 63-67; Amici Br. 58-61) that the evidentiary privilege derived from the Speech or Debate Clause is an institutional privilege that cannot be waived by an individual Senator or Representative. After applying the institutional label, however, respondent strongly implies that, in his view, neither Congress as a whole nor a single House can waive the protection of the Clause.[48] Amici make the point explicit (Amici Br. 60-61).

[48] The implication that Congress itself cannot waive the Speech or Debate privilege arises from respondent's persistent attempts to cast his argument in jurisdictional terms. These repeated characterizations of the Speech or Debate Clause as a jurisdictional provision are inaccurate and misleading. The Clause does not adjust the authority vested in the federal courts by Article III of the Constitution and the judicial code. And it does not create an impenetrable wall between Congress and the courts, through which evidence of legislative acts can never pass. Such evidence is plainly admissible in some circumstances; materials gathered in the course of an investigative hearing, for example, may be highly probative of facts at issue in civil litigation. There is no reason to believe that the Speech or Debate Clause deprives courts of "jurisdiction" to receive such evidence.

On the contrary, the legislative privilege, like other privileges, simply means that in some circumstances, for reasons unrelated to the truth-seeking process, it is deemed desirable to keep certain kinds of evidence from the trier of fact. The privilege is an evidentiary rule designed to protect particular values in particular litigation situations. It does not affect the power of courts to adjudicate controversies by considering all relevant evidence properly introduced.

This is an extraordinary position. It means that every time a Senator or Representative testifies about his legislative activity, he violates an inflexible shield provided by the Speech or Debate Clause, ostensibly for his own protection. According to respondent's view, his testimony and production of documents before the grand juries in this very case violated the constitutional provision. The logical outgrowth of the argument that a Member of Congress cannot waive the Speech or Debate privilege is that a person in respondent's position cannot introduce evidence of his legislative activity even if he chooses to do so. In defending himself against the bribery charges in this case, respondent might well wish to inform the jury in detail about his handling of private immigration legislation. If respondent is correct that no waiver is possible, such evidence would presumably be inadmissible.[49] But if the Member of Congress

[49] We say "presumably" because it is not entirely clear in respondent's conception of the privilege who could raise a valid objection to a Congressman's proffer of evidence of his own legislative activity. If the district court truly lacks jurisdiction to consider such evidence, as respondent contends (see note 48, *supra*), then perhaps the government could appropriately object to a Congressman's attempted waiver or the court sua sponte could exclude the proffered evidence. On the other hand, if the Speech or Debate Clause privilege, though not jurisdictional, properly belongs to Congress as an institution, then perhaps only another Member of Congress or some designated representative of a House of Congress could object to a Member's effort to introduce evidence of his legislative acts. In many instances, of course, the practical effect of the latter rule would be the admission of privileged evidence, simply because no one would object to the Member's invalid waiver. The Member would then have the best of

himself decides to place evidence of his legislative acts before the jury, it is difficult to see how admission of that evidence could jeopardize the congressional independence guaranteed by the Speech or Debate Clause. The absolute bar to waiver advocated by respondent and amici is not necessary to achieve the Clause's purpose of insulating the Legislative Branch from outside interference.

Moreover, a prohibition on waiver by an individual Member of Congress is not rooted in the language of the Speech or Debate Clause. The Clause forbids the questioning of Senators and Representatives outside Congress about their legislative activity in Congress. The natural reading of this provision is that Members of Congress are to be free from criminal prosecution, civil suit, and compulsion to testify with regard to their legislative conduct. The Clause thus achieves its goal of protecting legislative independence by guaranteeing the freedom of individual legislators. Nothing in the Clause suggests that, if a Member of Congress voluntarily decides to produce evidence of his legislative acts, a court or grand jury nevertheless cannot consider the testimony or documents offered. It is enough to effectuate the Clause's purpose that a Member of Congress knows he need

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both worlds; he could introduce evidence of protected acts as long as he thought it would help him, but if the tide appeared to turn and the evidence assumed an inculpatory cast, he could assert his nonwaivable privilege and remove the material from the jury's consideration. Such an occurrence cannot have been intended by the Framers of the Speech or Debate Clause.

not comply with any evidentiary demand concerning his congressional behavior.

Although there is little explicit authority on the subject of waiver of the Speech or Debate Clause privilege, the prevailing view appears to be that the privilege is a personal one for the individual Member. See *Gravel* v. *United States*, *supra*, 408 U.S. at 622 n.13 ("an aide's claim of privilege can be repudiated and thus waived by the Senator");[50] *Powell* v. *McCormack*, *supra*, 395 U.S. at 505; *United States* v. *Brewster*, *supra*, 408 U.S. at 547 (Brennan, J., dissenting) ("a personalized legislative privilege"); *In re Grand Jury Proceedings* (*Cianfrani*), 563 F.2d 577, 585 (3d Cir. 1977) ("It is not an institutional privilege belonging to the legislature itself, but rather is personal in nature"); *United States* v. *Craig*, 528 F.2d 773, 780-781 (7th Cir. 1976) (holding that a state legislator subject to federal criminal charges can waive his common law speech or debate immunity by testifying voluntarily before a grand jury), vacated and remanded on other grounds, 537 F.2d 957 (7th Cir. 1976) (en banc) (state legislators enjoy no such common law immunity); *Coffin* v. *Coffin*, *supra*, 4 Mass. at 27 ("the

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[50] Respondent argues (Br. 63-65) that this footnote in *Gravel* merely means that the Congressman, rather than the aide, must determine whether to waive the privilege available to the aide. But if this is the point of the footnote, then it was superfluous, for the discussion in the text preceding the footnote makes clear that the privilege is the Senator's, not the aide's. See 408 U.S. at 621-622. The footnote therefore must mean that the Senator may waive the privilege for himself as well as for his aide.

privilege secured by [the speech or debate provision in a state constitution] is not so much the privilege of the house, as an organized body, as of each individual member composing it"). But see T. Jefferson, *Manual of Parliamentary Practice*, reprinted in *Barclay's Constitutional Manual and Digest* 58 (1865). The widespread assumption that a Congressman can waive his Speech or Debate Clause privilege reflects the general understanding that the constitutional provision preserves legislative independence by insulating individual legislators from harassment by the Executive and Judicial Branches. If a Senator or Representative voluntarily cooperates with a criminal investigation or participates in a civil case, there is no reason to deny the criminal justice system the fruits of that cooperation solely on the ground that a privilege that the Congressman felt no need to assert cannot be waived.[51]

D. In View of Respondent's Undisputed Awareness of the Speech or Debate Clause and His Explicit Eschewal of Any Request for Immunity, His Voluntary Testimony and Production of Documents Were Sufficient to Waive His Evidentiary Privilege.

Respondent voluntarily testified and produced documents before the grand juries. He did so with an

[51] Under petitioner's view, he would have been incapacitated to appear as a defense witness in the prosecution of DeFalco and to testify there regarding his legislative actions. While the Clause would preclude the compulsion of such testimony over objection by the Congressman, we find it inconceivable that a Congressman could not agree to provide evidence in such a case.

awareness of his Speech or Debate Clause privilege. His cooperation was not the product of coercion but rather was intended to procure a tactical advantage by demonstrating to the grand juries that he had nothing to hide. The same tactical choice also explains respondent's bravado announcement at his first grand jury appearance (C.A. App. 699): "I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances." Respondent's conduct was adequate to constitute a waiver of his evidentiary privilege under either a "voluntary" or a "knowing and intelligent" standard. Indeed, he does not argue otherwise.

He does contend, however, that a test even stricter than the "knowing and intelligent" standard should be applied in determining whether a Member of Congress has waived his evidentiary privilege. Without describing what is in his view the appropriate test, respondent asserts (Br. 68) that "plainly such a waiver could not be found on the facts of this case." The courts below agreed and held that a valid waiver can be found only if a Member of Congress "expressly forfeits his protection under the Clause for the purposes for which the Government seeks to use the evidence of his legislative acts" (78-349 Pet. App. 31a).

This extraordinary standard, not satisfied even by "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)), would effectively preclude valid waivers of the legislative privilege. And it

would do so without any apparent gain for the purposes served by the Speech or Debate Clause. Respondent could have asserted his privilege when the United States Attorney asked him to testify and produce documents concerning the introduction of private immigration bills. Had he done so, he would have avoided distraction from his legislative duties, prevented inquiry into his legislative acts, and reaffirmed his independence from the Executive and Judicial Branches. But respondent deliberately chose not to do so and instead to cooperate with the grand jury's investigation. To permit him now to bar judicial consideration of his testimony and the documents he produced will not contribute to his or any other Congressman's independence. It will merely allow him to avoid the negative effects of his failed strategy to influence the grand jury.

The district court thought a strict waiver standard was necessary for two reasons,[52] both of which respondent now embraces (Br. 68-69). First, the court feared that adoption of some lesser standard such as voluntariness would "force a legislator, in order to preserve his privilege, to refrain from reference to his legislative acts when outside the House" (78-349 Pet. App. 56a). This concern, perhaps prompted by some imprecision in the government's argument below, dissolves when one recalls the dif-

[52] The court of appeals, in affirming the district court's decision, treated the waiver issue in less detail and did not specifically repeat the district court's reasoning (78-349 Pet. App. 29a-32a).

ferences between respondent's production of evidence before the grand juries and the ordinary "dissemination of information about a member's legislative conduct" that the district court sought to protect. We do not contend here that the Speech or Debate privilege is waived whenever a Senator or Representative refers to a legislative act in campaign speaking or casual conversation outside Congress. We argue only that a valid waiver can be found in respondent's production of evidence before the grand juries in this case, after respondent was informed of the nature and purpose of the grand jury investigation and after he was told that he was not required to testify and produce documents, but that if he did, the materials could be used against him in subsequent court proceedings. Recognizing a waiver under these circumstances would not inhibit a Congressman's ordinary communications with constituents and others concerning his past legislative performance. The problem with the waiver standard adopted by the courts below is that it would not permit a finding of waiver even where a Senator or Representative does know the purpose of a particular investigation and deliberately fails to claim the privilege.

The district court's second justification for adoping a stringent waiver test is more difficult to explain. The court's reasoning is based on a misunderstanding of the holding in *Gravel* v. *United States*, *supra*, 408 U.S. at 628-629. In the court's view (78-349 Pet. App. 57a), *Gravel* held that "while a legislator has Speech or Debate rights when his acts are called into question, he has no such rights when called to

testify concerning third-party crime." From this the district court concluded that there can be no valid waiver of the Speech or Debate privilege unless the Senator or Representative knows the precise purpose for which the government wishes to use evidence of his legislative acts. The court reasoned that in the absence of notice of the government's purpose, a Congressman might think that his acts were not in question and therefore that he could not claim any privilege under the Speech or Debate Clause. Respondent perpetuates the district court's misreading of *Gravel* when he argues (Br. 68) that a prerequisite to a valid waiver of his evidentiary privilege before the grand jury was a warning that he was a target of the government's investigation. Without such a warning, respondent contends (*ibid.*), "he had every right to believe that the investigation concerned third-party crimes as to which the Speech or Debate Clause would be inapplicable."

Respondent and the district court are mistaken in their assumption that *Gravel* created different classes of rights under the Speech or Debate Clause, depending on whether a particular law enforcement inquiry focused on a Senator or Representative's conduct or the conduct of some third party. On the contrary, regardless of the purpose of a given investigation, Congressmen retain an unvarying privilege not to be questioned about their legislative acts.[53] *Gravel* holds

[53] This is similar to the settled proposition that the privilege against compelled self-incrimination is not restricted to testimony in a proceeding directed against the person asserting

only that, although Congressmen are immune from questioning about their legislative acts, they are not immune from questioning about information they obtained in the course of preparation for legislative acts. Of course, in some circumstances, the preparation for a legislative act might itself be a legislative act, *e.g.*, research and consultation in preparation for the drafting of a bill. In such a situation, *Gravel* would not permit questioning about either the preparation or the later act. In other circumstances, however, preparation for future legislative acts may not itself qualify as a legislative act, *e.g.*, a Congressman's enrollment and attendance in a law school course on federal jurisdiction. In such cases, *Gravel* teaches, the Congressman may be questioned about information obtained in preparation for legislative acts, and he may be so questioned whether he himself or some third party is the subject of inquiry.

In short, there is simply no support for respondent's contention that his ability to assert a Speech or Debate privilege depended on the identity of the persons under investigation by the grand jury.[54] His privilege was identical, whether or not he was a grand jury target. Notwithstanding the district

the privilege, but is equally available to one called as a witness in a case to which he is not a party. See 8 *Wigmore on Evidence* § 2270, at 414 (J. McNaughton rev. 1961).

[54] Assuming that respondent entertained a good-faith misunderstanding of *Gravel*, his proper course would have been to assert his legislative privilege and then to see whether the government objected on the ground that he was not a grand jury target. After his voluntary testimony and production

court's opinion, *Gravel* affords no basis for imposing a uniquely demanding waiver standard under the Speech or Debate Clause.

E. Even if Respondent's Testimony and Production of Documents Do Not Constitute a Waiver with Respect to the Use at Trial of the Evidence Thus Obtained, They Do Foreclose Any Objection to the Grand Jury's Consideration of that Evidence.

Because respondent was advised of the nature of the grand jury's investigation and was clearly and repeatedly informed that any testimony he gave or documents he produced before the grand juries could be used against him in later court proceedings, we have argued that respondent waived his evidentiary privilege with respect to this material, in connection with both its use by the grand juries and its later introduction at trial. If the Court should reject this argument and hold that respondent retains the right to assert the privilege at his trial on the bribery charges, it should nevertheless rule that his disclosures before the grand juries constituted a valid waiver with respect to the ongoing grand jury investigation. At the very least, the Court should hold that respondent is now estopped from complaining about the grand jury's consideration of his legisla-

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of documents, combined with the district court's express finding that he was aware of the Speech or Debate Clause, respondent should not be heard to contend that he thought he could not claim any privilege. Respondent's argument is further discredited by the fact that he did assert the privilege on one occasion in his penultimate grand jury appearance (C.A. App. 1501-1052).

tive acts, because he himself is responsible for allowing the grand jury to see the private bills and his correspondence files. Even if respondent, acting alone, could not waive the Speech or Debate privilege, or even if the court of appeals' strict waiver standard is appropriate, respondent should still not be permitted to benefit now by attacking his indictment on the ground that the grand jury wrongly reviewed materials that he voluntarily provided.[55]

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[55] Respondent makes much of the fact that he did not testify or produce documents before the grand jury that actually indicted him. Respondent was unquestionably aware, however, of the grand jury procedure employed by the United States Attorney, a procedure involving the use of several different grand juries, all in session during the same period of time and each meeting once a week (see 78-546 Pet. App. 9a-14a). This procedure explains why respondent testified before eight grand juries instead of only one. Respondent now suggests that, although he may have waived his Speech or Debate privilege with respect to the use of his testimony and documents by the grand juries before which he appeared, he executed no such waiver in connection with the ninth grand jury, the one that actually indicted him. This contention ignores the reality of the situation as respondent knew it at the time. As he appeared before the successive grand juries, respondent was aware that each grand jury was familiar with some or all of the testimony he gave and documents he produced before the earlier grand juries. He also knew that the subject matter of each grand jury's investigation was identical—alleged corruption in connection with private immigration legislation. In this situation, there is no basis for respondent's argument that any waiver he may have made was limited to the grand juries before which he appeared and did not extend to the continuing grand jury investigation.

CONCLUSION

The judgment of the court of appeals in No. 78-349 should be reversed. The judgment of the court of appeals in No. 78-546 should be affirmed.

Respectfully submitted.

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